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No. 97-1978

In The

Supreme Court of the United States

October Term, 1997

FALCON DRILLING COMPANY, INC.,
FALRIG OFFSHORE (U.S.A.), L.P. and
LIVERPOOL & LONDON STEAMSHIP PROTECTION
& INDEMNITY ASSOCIATION,

Petitioners,

versus

PATRICK VIATOR,

Respondent.

**On Petition For Writ Of Certiorari
To The Court Of Appeal,
Third Circuit, State Of Louisiana**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the Louisiana Court of Appeal for the Third Circuit violate the principles of uniformity recognized by this Court as necessary in application of the Jones Act, 46 U.S.C. § 688 et seq., and deny Petitioners' substantive federal rights by failing to apply the same standards of contributory negligence and employer fault under the Jones Act recognized by the United States Court of Appeals for the Fifth Circuit?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Court of Appeal, Third Circuit, State of Louisiana whose decision is sought to be reviewed, and in the Supreme Court of Louisiana, were:

Falcon Drilling Company, Inc., Petitioner[1]

Falrig Offshore (U.S.A.), L.P., Petitioner

Liverpool & London Steamship Protection & Indemnity Association, Limited, Petitioner

Patrick Viator, Respondent

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[1] Both Falcon Drilling Company, Inc. and Falrig Offshore (U.S.A.), L.P. are now wholly-owned subsidiaries of R & B Falcon Corporation by virtue of a merger between Falcon Drilling Company, Inc. and Reading & Bates Corporation effective January 1, 1998. On March 31, 1998 Falcon Drilling Company, Inc. changed its name to R & B Falcon Drilling (U.S.), Inc.

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TO THE HONORABLES, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

OPINION BELOW

Respondent, Patrick Viator, brought this civil action for damages against Petitioners, Falcon Drilling Company, Inc., Falrig Offshore (U.S.A.), L.P., and Liverpool & London Steamship Protection & Indemnity Association, under the Jones Act in the 15th Judicial District Court, Parish of Vermilion, State of Louisiana, pursuant to the "saving to suitors" clause, 28 U.S.C. §1333, which allows a seaman to file an admiralty case in state court. This case was tried to the Honorable Allen M. Babineaux, District Judge for the 15th Judicial District Court, Parish of Vermilion, State of Louisiana, from April 2 - April 4, 1996. In a ruling issued on August 21, 1996, Judge Babineaux found Petitioners liable under the Jones Act and awarded Respondent $538,244.25, plus interest and costs.[2] A judgment to that effect was executed by Judge Babineaux on September 24, 1996.[3] Petitioners timely appealed to the

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[2] Appendix, Exhibit B, App. 22. In addition to the August 21, 1996 ruling, Judge Babineaux issued two amended rulings further apportioning the damage award between past and future damages and clarifying the interest owed on the award. Judge Babineaux also issued a ruling denying Petitioners' request for written findings of fact and reasons for judgment and awarding costs to Respondent. A judgment on the request for written findings of fact and reasons for judgment and award of costs was signed by Judge Babineaux on December 13, 1996. None of those other rulings or judgments have any bearing on this writ application, however, copies are attached in Appendix A for this Court's reference.

[3] Appendix, Exhibit C, App. 36.

Louisiana Court of Appeal for the Third Circuit and suspended execution of the judgment by filing a suspensive appeal bond.[4]

While this matter was pending on appeal, the United States Court of Appeals for the Fifth Circuit recognized that it had been applying erroneous negligence standards to Jones Act cases; the Fifth Circuit had been erroneously applying a duty of slight negligence to Jones Act employers and a duty of slight care to seamen. The Fifth Circuit held that the appropriate standard of employer fault was, and should always have been, "ordinary prudence under the circumstances." The Fifth Circuit also held that the appropriate standard for a seaman's contributory negligence was not a "slight duty to protect themselves," but rather a duty of "ordinary prudence under the circumstances." *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331 (5th Cir. 1997) (en banc). Prior to *Gautreaux*, Louisiana state courts followed United States Court of Appeals for the Fifth Circuit jurisprudence and also held employers to a slight negligence standard and seamen to a slight duty of care. One of Petitioners' assignments of error to the Louisiana Court of Appeal for the Third Circuit was that Judge Babineaux erred as a matter of law because he applied the Louisiana state court's adoption of the pre-*Gautreaux* Jones Act negligence standards. The Louisiana Court of Appeal for the Third Circuit disregarded *Gautreaux* and affirmed the judgment of the trial court.[5] Petitioners applied for rehearing

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[4] Appendix, Exhibit D, App. 39.

[5] Appendix, Exhibit A, App. 1, also reported as *Viator v. Liverpool & London Steamship Protection and Indemnity Association*, 701 So.2d 487 (La. App. 3d Cir. 1997).

but the request was denied by order dated December 8, 1997.[6]

While this matter was pending on appeal, Petitioners were also pursuing an appeal to the United States Court of Appeals for the Fifth Circuit in a case similar to this one in which the United States District Court applied the pre-*Gautreaux* negligence standards to a case tried before *Gautreaux*. The Fifth Circuit held that the Jones Act negligence standards recognized in *Gautreaux* should be applied to a case, such as this one, tried before *Gautreaux* and decided on appeal after *Gautreaux*. *Crawford v. Falcon Drilling Company, Inc.*, 131 F.3d 1120 (5th Cir. 1997). At that time, the Supreme Court of Louisiana also appeared to agree with the Fifth Circuit's decision in *Crawford* as it cited with approval the application of the Jones Act negligence standards recognized in *Gautreaux* to a case tried before *Gautreaux* and decided on appeal after *Gautreaux*. *Foster v. Destin Trading Corp.*, 700 So.2d 199 (La. 1997). Petitioners filed an application to the Louisiana Supreme Court for writ of certiorari again asserting that the lower courts had erred by failing to apply the appropriate Jones Act negligence standards. The Louisiana Supreme Court denied the application on March 13, 1998.[7] Petitioners then filed a motion with the Louisiana Supreme Court to stay execution of the judgment pending application for writ of certiorari to this Court which was denied on

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[6] Appendix, Exhibit H, App. 51, also reported as *Viator v. Liverpool & London Steamship Protection and Indemnity Association*, 1998 WL 181651 (La. 1998).

[7] Appendix, Exhibit E, App. 45.

March 25, 1998.[8] A similar application for stay filed with this Court was denied on April 1, 1998.[9]

STATEMENT OF THE BASIS FOR JURISDICTION

This case is one under the Jones Act, 46 U.S.C. §688 et seq. Petitioners applied to the Louisiana Supreme Court for discretionary review of the decision of the Louisiana Court of Appeal for the Third Circuit on March 13, 1998, but the Louisiana Supreme Court denied that application.[10] This Court, thus, has jurisdiction to review this case under 28 U.S.C. §1257 which grants this Court jurisdiction to review judgments or decrees rendered by the highest court of a state in which a decision could be had whenever any right is claimed under the Constitution, treaties, or statutes of the United States. Under the case of *Interstate Circuit v. Dallas*, 390 U.S. 676, 20 L.Ed.2d 225, 88 S.Ct. 1298 (1968), it is proper to seek review of the opinion of the Louisiana Court of Appeal for the Third Circuit as the Louisiana Supreme Court denied discretionary review of the judgment of that Court. This Court has previously exercised its right to review state court decisions involving the Jones Act, 46 U.S.C. §688 et seq., in cases such as *Garrett v. Moore-McCormick Company, Inc.*, 317 U.S. 239, 87 L.Ed. 239, 63 S.Ct. 246 (1942) and *American Dredging Company v. Miller*, 510 U.S. 443, 127 L.Ed.2d 285, 114 S.Ct. 981 (1994).

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[8] Appendix, Exhibit F, App. 47.

[9] Appendix, Exhibit G, App. 49.

[10] Appendix, Exhibit E, App. 45.

This case is also appropriate for consideration by this Court under Rule 10 of this Court's Rules which provides, in pertinent part, that this Court may grant a writ of certiorari when "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeals." In that regard, Petitioners submit that the Louisiana Court of Appeal for the Third Circuit's refusal to apply the appropriate Jones Act negligence standards to this case conflicts with the decision of the United States Court of Appeals for the Fifth Circuit in *Gautreaux* and *Crawford*, which held that the Jones Act negligence standards recognized in *Gautreaux* applied to cases tried before *Gautreaux* and decided on appeal after *Gautreaux*.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

The pertinent statutes involved in this case are:

1. 28 U.S.C. §1257(a):

§1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up

or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

2. 28 U.S.C. §1333(1):

§1333. Admiralty, maritime and prize cases

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

3. 46 U.S.C. §688(a):

§688 Recovery for injury to or death of seamen

(a) Application of railway employee statutes; jurisdiction. Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply . . .

4. **Rule 10(b) Considerations Governing Review on Certiorari**

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers . . .

(b) A state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

STATEMENT OF THE CASE

This state court civil action for damages under the Jones Act, 46 U.S.C. §688 et seq., arose out of an alleged accident which occurred on November 16, 1993 aboard the jack-up rig ACHILLES involving Patrick Viator, an experienced and well-trained employee of Falcon Drilling Company, Inc. At the time of the accident, Mr. Viator's crew was in the process of "tripping" or inserting drill pipe into the well.

Tripping pipe into the well involves the coordination of the members of the drill crew: the driller; the floor-hands; and the derrickman (in this case, Mr. Viator). The driller operates the drawworks of the rig. The drawworks are strung with cable which is attached to the block of the rig. Elevators, a piece of equipment which latches around the drill pipe, are attached to the block. When the driller engages the drawworks, the cable lifts the block and the elevators; the block and the elevators are lowered when the driller disengages the drawworks. The derrickman (in this case, Mr. Viator) is positioned on a monkeyboard, a small board attached to the derrick, approximately ninety feet above the rig floor. The drill pipe is located in the derrick and held in place by fingers, pieces of iron which keep the drill pipe from falling.

Tripping pipe into the hole is commenced when the derrickman grabs the top of a piece of pipe and moves it to the front of the monkeyboard. The derrickman is secured on the monkeyboard by a belt which secures to the derrick behind him. It is the derrickman's responsibility to make sure the belt is the proper length. When the derrickman moves the piece of pipe to the center of the derrick, the driller engages the drawworks. The drawworks lift the block and the elevators towards the derrickman. The derrickman's job is to push the drill pipe into the open elevators. The derrickman then latches the elevators and they continue to rise. Drill pipe is constructed with a box end (an end wider than the rest of the pipe) on top which allows another piece of pipe to be screwed into it and a pin end (an end with threads) at the bottom which is screwed into another joint of pipe. The elevators latched around the drill pipe hit the box end of the pipe and lift the pipe. The intention of the driller is to lift the pipe approximately three to four feet so the floorhands on the drill floor can stab the pin end of the pipe into the pipe in the well. The floorhands, thereafter, screw the pipes together with the tongs. The driller then lifts the entire string of pipe so the floorhands can remove the slips, a device which prevents the pipe from falling into the well. The driller then disengages the drawworks and lowers the new pipe into the well. The floorhands set the slips which prevent the pipe from falling into the well and unlatch the elevators. The driller then lifts the elevators to repeat the operation.

The accident alleged in this case occurred when Mr. Viator took hold of one of the stands of pipe in the derrick and walked out to the end of the monkeyboard to

move the top end of the pipe to the center of the derrick to await the elevators. Mr. Viator's safety belt, which he was responsible for maintaining, did not have enough slack to allow him to reach the end of the monkeyboard. He, therefore, reached back to adjust his safety lines. After flipping the tie-back rope of his safety belt off a hook in the derrick, Mr. Viator realized he had allowed too much slack in his safety belt. He reached this conclusion when his safety line allowed him to lean too far out over the monkeyboard towards the center of the derrick. As a result, Mr. Viator lost his balance. Fortunately, the block and elevators had arrived and he was able to push off the block to attempt to regain his balance. Although he made an effort, he was unable to latch the stand of pipe in the elevators and the joint of pipe began to fall to his left. Mr. Viator attempted to grab the pipe in an effort to control it and, by his own admission, keep himself from falling. Unfortunately, after being unable to control the stand of pipe, Mr. Viator failed to release the pipe and was pulled off the monkeyboard and onto the fingers of the derrick.

Mr. Viator filed suit against Petitioners, Falcon Drilling Company, Inc., Falrig Offshore (U.S.A.), L.P. and Liverpool & London Steamship Protection & Indemnity Association (hereinafter collectively referred to as "Petitioners") in the Fifteenth Judicial District Court, Parish of Vermilion, State of Louisiana, pursuant to the "saving to suitors" clause, 28 U.S.C. §1333, which allows a seaman to file an admiralty case in state court. The case was tried to the Honorable Allen M. Babineaux, District Judge for the Fifteenth Judicial District Court, Parish of Vermilion, State of Louisiana, on April 2 - 4, 1996. Judge Babineaux

found Petitioners liable under the Jones Act and awarded Mr. Viator $538,244.25, plus interest and costs by ruling dated August 21, 1996.[11] A judgment to that effect was executed by Judge Babineaux on September 24, 1996.[12] Petitioners perfected a timely appeal to the Louisiana Court of Appeal for the Third Circuit and suspended the execution of the judgment by filing a suspensive appeal bond.[13]

While this matter was pending on appeal, the United States Court of Appeals for the Fifth Circuit recognized that it had been applying erroneous negligence standards to Jones Act cases; the Fifth Circuit had been erroneously applying a duty of slight negligence to Jones Act employers and a duty of slight care to seamen. The Court held that the appropriate standard of employer fault was, and should always have been, "ordinary prudence under the circumstances." The Court also held that the appropriate standard for a seaman's contributory negligence was not a "slight duty to protect themselves," but rather a duty of "ordinary prudence under the circumstances." *Gautreaux*, supra. One of Petitioners' assignments of error to the Louisiana Court of Appeal for the Third Circuit was that Judge Babineaux erred as a matter of law because he applied the Louisiana state court's adoption of the pre-*Gautreaux* Jones Act negligence standards. The Court of Appeal disregarded *Gautreaux* and affirmed the

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[11] Appendix, Exhibit B, App. 22.

[12] Appendix, Exhibit C, App. 36.

[13] Appendix, Exhibit D, App. 39.

Judgment.[14] Petitioners sought rehearing but the Court of Appeal denied rehearing by order dated December 8, 1997.[15]

While this matter was pending on appeal, Petitioners were also pursuing an appeal to the United States Court of Appeals for the Fifth Circuit in a similar case in which the United States District Court applied the pre-*Gautreaux* negligence standards to a case tried before *Gautreaux*. The Fifth Circuit held that the Jones Act negligence standards recognized in *Gautreaux* should be applied to a case, such as this one, tried before *Gautreaux* and decided on appeal

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[14] Appendix, Exhibit A, App. 1, also reported as *Viator v. Liverpool & London Steamship Protection and Indemnity Association*, 701 So.2d 487 (La. App. 3d Cir. 1997). The Court of Appeal's argument that they would not assume that Judge Babineaux applied the wrong standard of negligence is illogical because Judge Babineaux could not have applied the Jones Act negligence standards recognized in *Gautreaux* at the time he issued his ruling, August 21, 1996, because *Gautreaux* was not decided until February 23, 1997. Additionally, at the time of Judge Babineaux's decision, the Louisiana Third Circuit Court of Appeal followed the decisions of the United States Court of Appeals for the Fifth Circuit and held that evidence of the slightest negligence was sufficient to find a Jones Act employer liable. *Watterson v. Mallard Bay Drilling, Inc.*, 649 So.2d 431 (La. App. 3d Cir. 1994), citing *Johnson v. Offshore Express, Inc.*, 845 F.2d 1347 (5th Cir. 1988). Additionally, in regard to contributory negligence, Louisiana state courts followed Fifth Circuit jurisprudence which recognized that a seaman had only a slight duty to protect himself. *Gray v. Texaco*, 610 So.2d 1090 (La. App. 3d Cir. 1992), citing *Spinks v. Chevron Oil Co.*, 507 F.2d 216 (5th Cir. 1975) and *Ceja v. Mike Hooks, Inc.*, 690 F.2d 1191 (5th Cir. 1982). Both *Spinks* and *Ceja* were specifically overruled by the Fifth Circuit in *Gautreaux*.

[15] Appendix, Exhibit H, App. 51.

after *Gautreaux*. *Crawford*, supra. At that time, the Louisiana Supreme Court also appeared to agree with the Fifth Circuit's decision as it cited with approval the application of the Jones Act negligence standards recognized in *Gautreaux* to a case tried before *Gautreaux* and decided on appeal after *Gautreaux*. *Foster v. Destin Trading Corp.*, 700 So.2d 199 (La. 1997). Petitioners filed an application to the Louisiana Supreme Court for writ of certiorari based on the *Crawford* decision that the *Gautreaux* Jones Act negligence standards applied to cases, such as this one, tried before *Gautreaux* and decided on appeal after *Gautreaux*. The Louisiana Supreme Court denied the application on March 13, 1998.[16]

REASONS FOR GRANTING THE WRIT

This Honorable Court should grant this writ of certiorari in this case to determine whether a state court can decline to adhere to the principles of uniformity that accompany the application of the Jones Act, 46 U.S.C. §688 et seq., thereby denying a litigant his federal rights. This issue arises in the context of a state court decision which is at odds with the decisions of the United States Court of Appeals for the Fifth Circuit in *Gautreaux* and *Crawford*.

The failure of the Louisiana Third Circuit Court of Appeal to apply the appropriate Jones Act negligence

[16] Appendix, Exhibit E, App. 45, also reported as *Viator v. Liverpool & London Steamship Protection and Indemnity Association*, 1198 WL 181651 (La. 1998).

standards to this case tried before *Gautreaux* and decided on appeal after *Gautreaux*, despite the decision of the United States Court of Appeals for the Fifth Circuit in *Crawford*, resulted in a breach of the principle of uniform application of the Jones Act. This case is unique because Petitioners, Falcon Drilling Company, Inc. et al., were the defendants in *Crawford* in which the United States Court of Appeals for the Fifth Circuit held that the negligence standards set forth in *Gautreaux* applied to cases tried before *Gautreaux* and decided on appeal after *Gautreaux*. Thus, the decisions of the Louisiana courts in this case have created a situation where Petitioners were involved in two Jones Act cases tried before *Gautreaux* and decided on appeal after *Gautreaux* in state and federal courts with different results. The effect of the foregoing is that Respondent in this case was afforded a more favorable Jones Act negligence standard because he filed his case in state court. He would have been subject to the *Gautreaux* standards, pursuant to *Crawford*, had he filed his Jones Act suit in federal court. The failure to apply the appropriate Jones Act negligence standard, therefore, seriously affected Petitioners' substantive federal rights by holding Petitioners to a negligence standard which was too high and holding Mr. Viator to a negligence standard which was too low.

Petitioners respectfully submit that this is the exact type of case envisioned by Congress when it enacted 28 U.S.C. §1257 which grants this Court jurisdiction to review judgments or decrees rendered by the highest court of a state in which a decision could be had whenever any right is claimed under the Constitution, treaties, or statutes of the United States, and Rule 10 of this

Court's rules which provides that this Court may grant a writ of certiorari when "a state court of last resort has decided on an important federal question in a way that conflicts with the decision of . . . a United States court of appeals." Accordingly, this Honorable Court should issue a writ of certiorari to cure this inconsistent application of the Jones Act and to protect Petitioners' substantive federal rights.

Furthermore, this Honorable Court should issue a writ of certiorari to establish or clarify the Jones Act negligence standards which are to be applied in state courts. Absent Supreme Court precedent delineating the proper standards of negligence in Jones Act cases, state courts are free to apply their own interpretation of federal law.

I. A Writ of Certiorari Should Issue to Cure A Non-Uniform Application of the Jones Act.

In *American Dredging v. Miller*, 510 U.S. 443, 127 L.Ed.2d 285, 114 S.Ct. 981 (1994) and *Garrett v. Moore-McCormack, Co.*, 317 U.S. 239, 87 L.Ed. 239, 63 S.Ct. 246 (1942), this Court held that the Jones Act adopts the "uniformity requirement" of the Federal Employers' Liability Act which requires state courts to apply the uniform federal law. *American Dredging*, 510 U.S. 443, 127 L.Ed.2d at 299, 114 S.Ct. 981 and *Garrett*, supra at 244, 87 L.Ed. at 243, 63 S.Ct. 246. In *Urie v. Thompson*, 337 U.S. 163, 93 L.Ed. 1282, 69 S.Ct. 1018 (1949), this Court reversed a decision of the Missouri Supreme Court applying state law to the question of what constituted negligence under the Federal Employers' Liability Act and

held that the question was governed by federal decisional law formulating and applying the concept. In the Jones Act context, this court has held that the uniformity requirement extends to the type of proof necessary for judgment. *Garrett*, supra at 244, 87 L.Ed. at 243, 63 S.Ct. 246, citing *New Orleans & N.E.R. Co. v. Harris*, 247 U.S. 367, 62 L.Ed. 1167, 38 S.Ct. 535.

As in *Urie*, the Louisiana Court of Appeal for the Third Circuit in this case applied standards of negligence other than that established by federal decisional law formulating and applying the concept. More particularly, the Louisiana Court of Appeal for the Third Circuit declined to apply the appropriate Jones Act negligence standards and instead applied its own interpretation of the appropriate Jones Act negligence standards. The Louisiana Court of Appeal for the Third Circuit applied the erroneous standards despite the United States Court of Appeals for the Fifth Circuit's recognition that the historical ordinary prudence standards "always should have been" applied to Jones Act cases. *Gautreaux*, 107 F.3d at 336 (5th Cir. 1997). Additionally, the Louisiana Supreme Court refused to review this case despite the United States Court of Appeals for the Fifth Circuit's decision in *Crawford* that the negligence standards set forth in *Gautreaux* should be applied to cases tried before *Gautreaux* and decided on appeal after *Gautreaux*. By failing to apply the proper Jones Act negligence standards, and instead applying its own interpretation of the appropriate Jones Act negligence standards – which pre-dated *Gautreaux*, the Louisiana Court of Appeal for the Third Circuit acted in derogation of the Jones Act uniformity principle.

This case is unique because Petitioners, Falcon Drilling Company, Inc., et al., were the defendants in *Crawford* in which the United States Court of Appeals for the Fifth Circuit held that the negligence standards set forth in *Gautreaux* applied to cases tried before *Gautreaux* and decided on appeal after *Gautreaux*. Thus, the decisions of the Louisiana courts in this case have created a situation where Petitioners were involved in two Jones Act cases tried before *Gautreaux* and decided on appeal after *Gautreaux* in state and federal courts with different results. The effect of the foregoing is that Respondent in this case was afforded a more favorable Jones Act negligence standard because he filed his case in state court. He would have been subject to the *Gautreaux* standards, pursuant to *Crawford*, had he filed his Jones Act suit in federal court. Accordingly, as in *Urie*, this Honorable Court should grant a writ of certiorari to cure the Louisiana Court of Appeal for the Third Circuit's breach of the Jones Act principle of uniform application.

II. A Writ of Certiorari Should Issue Because the State Court's Failure to Apply the Appropriate Jones Act Negligence Standards Denied Petitioners' Their Federal Rights.

As noted above, in *Urie v. Thompson*, 337 U.S. 163, 93 L.Ed. 1282, 69 S.Ct. 1018 (1949), this Court held that what constitutes negligence under the Federal Employers' Liability Act is not governed conclusively by state court decisions but rather is a federal question subject to independent review by this Court. 337 U.S. at 174, 93 L.Ed. at 1295, 69 S.Ct. 1018. Accordingly, the Court in *Urie*

reversed a decision of the Missouri Supreme Court which it held had applied the wrong negligence standard.

In *Garrett*, supra, this Court also noted that when deciding issues under federal law, the state courts are bound to proceed in such a manner that all of the substantive rights of the parties under the controlling federal law are protected. More particularly, the *Urie* Court noted that in deciding an issue under the Jones Act, the state courts are not allowed to alter the rights of either litigant as established under federal law. 317 U.S. at 245-246, 87 L.Ed. at 244, 63 S.Ct. 246 (1942). This Court in *Garrett* was faced with determining whether a state court applied the appropriate standard or burden of proof in deciding whether a release entered into by a seaman was enforceable. The Pennsylvania Supreme Court had applied state rather than admiralty law in determining whether or not the release was enforceable. The seaman applied for writs to this Court which granted the writs noting that the question of whether the state court proceeded in such a manner that the parties' substantive rights under federal law were protected raised a reviewable federal question. *Garrett*, 317 U.S. 239, 87 L.Ed. 239, 63 S.Ct. 246 (1942). After noting the need for uniform interpretation of the Jones Act, this Court found that the Pennsylvania Supreme Court had denied the seaman his substantive federal rights by applying the state's burden of proof instead of the applicable admiralty standard. This Court thus reversed the decision of the Pennsylvania Supreme Court and remanded the case. *Garrett*, 317 U.S. at 249, 87 L.Ed. at 246, 63 S.Ct. 246 (1942).

The *Urie* and *Garrett* cases clearly illustrate that this Court will not allow a state court to deny a litigant its

rights under federal law by failing to apply the appropriate standards of negligence or burden of proof in a Jones Act or Federal Employers' Liability Act case brought in state court. The Louisiana Court of Appeal for the Third Circuit in this case failed to apply the appropriate Jones Act negligence standards denying Petitioners their federal substantive rights. Petitioners applied to the Louisiana state courts to correct the error but were denied relief. Thus, Petitioners' only remaining avenue of relief from the application of the erroneous Jones Act negligence standards is through writ of certiorari by this Court.

The denial of substantive federal rights suffered by Petitioners as a result of the Louisiana Court of Appeal's failure to apply the appropriate negligence standards in this case is clearly illustrated in the case of *Crawford v. Falcon Drilling Company, Inc.*, supra. The *Crawford* case involved an injury to a derrickman performing an operation similar to that performed by Mr. Viator in the present case. In *Crawford*, the United States Court of Appeals for the Fifth Circuit noted that the District Court's use of the erroneous pre-*Gautreaux* Jones Act negligence standards affected the employer's substantive rights by seriously misstating the law. The Fifth Circuit stated that the standards recognized by it before *Gautreaux* embodied a strong presumption that a Jones Act employer was responsible for the injuries of the seaman while contributing very little responsibility to the seaman himself and were in direct contrast to the appropriate standards recognized in *Gautreaux* which hold both the employer and the seaman to the "ordinary prudence" standard of negligence under the Jones Act. *Crawford*, 131 F.3d at 1126 (5th

Cir. 1997). The Fifth Circuit further found that had the proper standards been applied, the District Court may very well have found the plaintiff to have been contributorily negligent to some degree. Accordingly, the Fifth Circuit found that the case so seriously affected the fairness, integrity or public reputation of judicial proceedings that it merited reversal on the basis of plain error.

As in *Crawford*, the trial court in this case applied the erroneous Jones Act negligence standards to the facts before it. More particularly, the trial court applied Louisiana's own interpretation of the appropriate Jones Act negligence standards which was based on an erroneous statement of those standards made by the United States Court of Appeals for the Fifth Circuit before *Gautreaux*. The Louisiana Court of Appeal for the Third Circuit then refused to apply the correct standards set forth by the Fifth Circuit in *Gautreaux*.

The record of this case also presents evidence that Mr. Viator's own actions may have placed him in unnecessary danger. As noted above, Mr. Viator allowed too much slack to exist in his safety belt and he lost his balance. He then attempted to grab the pipe to prevent himself from falling, rather than allowing the pipe to fall, causing him to be pulled off the monkeyboard and onto the fingers of the derrick allegedly sustaining injuries. Additionally, there is other evidence in the record which indicates that Petitioners' actions were in accordance with industry standard and thus that they were not negligent. Thus, Petitioners may not have been held liable in this case if the appropriate negligence standards had been applied. Additionally, Mr. Viator may have been found guilty of contributory negligence in causing his

own injuries. Accordingly, the Louisiana Court of Appeal for the Third Circuit's refusal to apply the appropriate Jones Act negligence standards denied Petitioners their substantive federal rights and a writ of certiorari should be issued to review the decision of the Louisiana Court of Appeals for the Third Circuit.

III. The Court Should Issue a Writ to Clarify or Establish the Jones Act Negligence Standards Applicable to Actions in State Court.

It is well established that when a Jones Act case is tried in state court federal admiralty and maritime law generally governs. *Marsh v. Penrod Drilling Company*, 619 So.2d 1124 (La. App. 4th Cir. 1993). When a state court decides a federal law issue, however, it can render a binding judicial decision resting on its own interpretation of federal law. *Asarco, Inc. v. Kadish*, 490 U.S. 605, 617, 104 L.Ed.2d 696, 715, 109 S.Ct. 2037 (1989). Once that occurs, the United States Supreme Court is responsible for assuring that state courts are not the final arbiters of important federal questions. *Asarco, Inc.*, 490 U.S. at 621, 104 L.Ed.2d at 718, 109 S.Ct. 2087, citing *Fidelity National Bank and Trust Company of Kansas v. Swope*, 274 U.S. 123, 130-131, 71 L.Ed. 959, 47 S.Ct. 511 (1927). To that end, Louisiana courts have recognized that they are bound by decisions of this Court. *Gaspard v. Transworld Drilling Company*, 468 So.2d 692 (La. App. 3d Cir. 1985), writ denied, 474 So.2d 1304 (La. 1985), cert. denied, 475 U.S. 1067, 106 S.Ct. 1382, 89 L.Ed.2d 607 (1986). Louisiana courts have also recognized that decisions rendered by the United States Court of Appeals for the Fifth Circuit on federal issues are persuasive. *State v. White*, 321 So.2d 491 (La. 1975).

Since decisions of the United States Court of Appeals for the Fifth Circuit are not binding, but are merely of persuasive authority in Louisiana courts, and only decisions of this Court on federal law are binding, a writ of certiorari should be issued in this case to establish or clarify for state courts the appropriate Jones Act negligence standards to be applied to cases decided before them under the saving to suitors clause, 28 U.S.C. §1333. Absent direction by this Court, state courts will be free to continue to interpret the Jones Act negligence standards in keeping with their own interpretation of federal law which, as in this case, will often result in the application of an improper standard in derogation of the principle of uniform application of the Jones Act previously recognized by this Court. Addressing the issues presented in this Petition for Writ of Certiorari will also reduce the possibility that future litigants will be denied their substantive federal rights through application of erroneous Jones Act negligence standards in state courts. Accordingly, a writ of certiorari should be issued in this case to establish or clarify the appropriate Jones Act negligence standards to be applied in those courts.

CONCLUSION

This case squarely presents this Court with the issue of whether a state court can decline the uniform application of the Jones Act and thereby deny a litigant his federal substantive rights. Petitioners, parties against whom claims under the Jones Act have been asserted, assert that the Louisiana Court of Appeal for the Third Circuit erred in applying erroneous Jones Act negligence

standards to this case in direct contravention of the recognition and delineation of the appropriate negligence standards set out by the United States Court of Appeals for the Fifth Circuit in *Gautreaux* and *Crawford*. Petitioners also assert that as a result of the application of the erroneous Jones Act negligence standards they have been denied their substantive federal rights. Petitioners sought reconsideration and review of the application of the erroneous standards from the Louisiana state courts but have been denied relief, leaving Petitioners with the sole recourse of applying for a writ of certiorari to this Court. Accordingly, it is only with such review that Petitioners will not be denied their substantive federal rights. Additionally, review of the issues presented in this application will establish or clarify the appropriate Jones Act negligence standards to be applied by all state courts in deciding such cases brought before them under the "saving to suitors" clause. A decision by this Court, therefore, will promote uniform application of the Jones Act and greatly reduce the possibility that future litigants will be denied their substantive federal rights through application of erroneous Jones Act negligence standards by state courts.

WHEREFORE, Petitioners respectfully pray that this Court grant their Petition for Writ of Certiorari, vacate the decision of the Louisiana Court of Appeals for the Third Circuit and remand this case for application of the appropriate Jones Act negligence standards.

Respectfully submitted,

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APPENDIX

EXHIBIT A

NUMBER 97-264

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

PATRICK VIATOR

Plaintiff-Appellee

VERSUS

LIVERPOOL & LONDON STEAMSHIP PROTECTION AND INDEMNITY ASSOCIATION, FALCON DRILLING COMPANY, INC. AND FALRIG OFFSHORE (U.S.A.), INC.

Defendants-Appellants

On appeal from the Fifteenth Judicial District court, [No. 65818], Parish of Vermilion, State of Louisiana, the Honorable Allen M. Babineaux, Judge, presiding.

Before: DOUCET, C.J., DECUIR and AMY, JJ.

DOUCET, Chief Judge.

This suit arises out of an accident on an offshore jack-up rig. The defendants, Falcon Drilling Company, Inc. (Falcon), Falrig Offshore (U.S.A.), L.P. (Falrig), and Liverpool and London Steamship Protection and Indemnity Association (Liverpool) appeal the judgment rendered against them in the suit.

It is undisputed that Patrick Viator was employed by Falcon as a floor hand/shaker hand on the Achilles, a jack-up rig in the Gulf of Mexico. Viator fell while he and the crew were inserting drill pipe into the well. Viator

sued Falcon; its insurer, Liverpool; and Falrig, the owner of the Achilles, alleging injuries to his cervical spine.

After a trial on the merits, the trial judge rendered judgment against the defendants and in favor of Viator. The judge found that Viator was a Jones Act seaman, that he was injured while in furtherance of the mission of the jack-up rig, Achilles, and that Viator was injured because of the negligence of his employer and of the unseaworthiness of the rig. He further found that Viator was free from fault in the accident. The court awarded Viator $100,000.00 for past physical and mental pain and suffering, permanent disability and loss of enjoyment of life; $150,000.00 for future physical and mental pain and suffering, permanent disability and loss of enjoyment of life; $19,593.25 for past medical expenses; $55,586.00 for past lost income and $225,000.00 for future lost income/loss of earning capacity. The defendants appeal.

LIABILITY OF FALCON

Based on three arguments, the defendants assert that Falcon should not have been found liable for the injury to Viator.

1. Standard of Care

The defendants first argue that the trial judge's finding of liability was based on application of an incorrect standard of care. Defendants contend that the trial court found that the slightest negligence on the part of Falcon was sufficient to sustain a finding of negligence, and that the seaman's duty to protect himself is slight. Defendants

assert that, under *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331 (5th Cir. 1997), both Falcon and Viator should be held to reasonably prudent behavior. The defendants argue that, because an inappropriate standard of care was applied, we should review the case *de novo* rather than under a manifest error standard of review. The plaintiff argues that *Gautreaux* is inapplicable because the decision was not handed down until sometime after the rendition of judgment in this case. The judgment and written reasons given by the trial judge in this case do not indicate the standard of care that he applied.

In *Gautreaux*, the court clarified the duty of care owed by an employer under the Jones Act:

> The language chosen by Congress to determine the responsibility of both employers and employees under the Jones Act is simple and direct. Nothing in the statute indicates Congress's intention to hold Jones Act employees to a standard of slight duty of care in the exercise of concern for their own safety. Below, we explain the statutory scheme and Supreme Court precedent interpreting it before we illustrate our departure from their clear mandates.
>
> 1. The Statutory Scheme and Supreme Court Precedent
>
> Under the Jones Act, seamen are afforded rights parallel to those of railway employees under the Federal Employers' Liability Act ("FELA"). 46 U.S.C. § 688. Section 51 of the FELA provides, in pertinent part, that "[e]very common carrier by railroad . . . shall be liable in damages . . . for such injury or death resulting in whole or in part from the negligence of any of

> the officers, agents, or employees of such carrier." 45 U.S.C. § 51 (emphasis added). A seaman is entitled to recovery under the Jones Act, therefore, if his employer's negligence is the cause, in whole or in part, of his injury. In their earlier articulations of § 51 liability, courts had replaced the phrase "in whole or in part" with the adjective "slightest." In Rogers v. Missouri Pacific R. Co., 352 U.S. 500, 506, 77 S.Ct. 443, 448, 1 L.Ed.2d 493 (1957), the Supreme Court used the term "slightest" to describe the reduced standard of causation between the employer's negligence and the employee's injury in FELA § 51 cases. In *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521, 523, 77 S.Ct. 457, 458, 1 L.Ed.2d 511 (1957), the Court applied the same standard to a Jones Act case, writing, " 'Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought.' " (quoting *Rogers*, 352 U.S. at 506, 77 S.Ct. at 448).
>
> Nothing in these cases, then, supports the proposition that the duty of care owed is slight. Rather, the phrase "in whole or in part" as set forth in the statute, or, as it has come to be known, "slightest," modifies only the causation prong of the inquiry. The phrase does not also modify the word "negligence." The duty of care owed, therefore, under normal rules of statutory construction, retains the usual and familiar definition of ordinary prudence.

Id. at 334-35.

The court in that case further clarified the seaman's duty of care, concluding that:

> A seaman, then, is obligated under the Jones Act to act with ordinary prudence under the circumstances. The circumstances of a seaman's employment include not only his reliance on his employer to provide a safe work environment but also his own experience, training, or education. The reasonable person standard, therefore, under the Jones Act becomes one of the reasonable seaman in like circumstances. To hold otherwise would unjustly reward unreasonable conduct and would fault seamen only for their gross negligence, which was not the contemplation of Congress.

Id. at 339.

Lacking any indication to the contrary, we will not assume that the trial court applied an incorrect standard. Therefore, we will not undertake a *de novo* review, but will review the record under a manifest error standard.

2. Competency of Edward Robert to Testify as an Expert.

Defendants seek to have this court disregard the testimony of the plaintiff's rig safety expert, Edward Robert, arguing he was not competent to testify as such. They argue that he did not have a sufficient background as a rig worker, and especially as a driller, to testify concerning the safe operation of drilling rigs by drillers.

The decision to qualify a witness as an expert is within the discretion of the trial court. A determination in this regard will not be disturbed on appeal lacking manifest error. *Carpenter v. Lafayette Woodworks, Inc.*, 94-1011 (La.App. 3 Cir. 2/1/95); 653 So.2d 1187. "The trial court

also has wide discretion to determine whether a question or subject falls within the scope of an expert's expertise." *Mitchell v. Popiwchak*, 95-1423 (La.App. 4 Cir. 6/26/96); 677 So.2d 1050, 1055.

Robert testified that he has a bachelor of science degree in petroleum geology from Louisiana State University. He has further received additional training in rig safety through a variety of seminars and courses. He worked as a geologist for the State of Louisiana in the Department of Conservation. He was employed as a safety and training director for Mayronne Company. As such, he conducted and supervised weekly on-site rig inspections and accident investigations. He was responsible for compliance with government safety regulations and implemented safety training programs. Additionally, he was an instructor at Energy Training Group, conducting courses and seminars relating to oil field operations, equipment and safety for private industry at the University of New Orleans. He is currently self-employed as a safety consultant primarily in the offshore and onshore drilling and transportation industries. He has testified in many courts, both federal and state, as an expert in the field of oil field rig safety. In traversing Robert on his qualifications, the defense brought out that he has never actually worked as a driller. The defendants contend that this deficiency disqualifies him as an expert in rig safety. However, Falcon has hired him as a rig safety expert to render opinions as to the safety of one of its rigs. Given his extensive training and experience in the field of rig safety, we cannot say the trial judge abused his discretion in qualifying Robert as an expert in the field of oil rig safety and operations.

3. Falcon's negligence.

Falcon further argues that the evidence does not support the conclusion that negligence on the part of Falcon or one of its employees was a cause of the accident. As the Fifth Circuit indicated in *Gautreaux*, 107 F.3d 331, the Jones Act contains a liberal causation requirement. A seaman is entitled to recover if the employer's negligence played any part, even the slightest, in producing his injury. "Moreover, a trial court's factual findings in general maritime and Jones Act cases are reviewed under this state's manifest error standard of review. *Milstead v. Diamond M Offshore, Inc.*, 95-2446, p. 11 (La.7/2/96); 676 So.2d 89, 96." *Hollenbeck v. Oceaneering Intern., Inc.*, 96 0377 (La.App. 1 Cir. 11/8/96); 685 So.2d 163, 169.

It is undisputed that the accident happened while Viator was acting as a relief derrick hand on the Achilles. The driller was Donald Thornton. The crew was inserting drill pipe into the well. As derrick hand, it was Viator's duty to stand on the derrick, ninety to ninety-five feet above the drill floor, take the top end of a stand of pipe out of the fingers of the derrick and, using a rope as support, move the pipe to the center of the derrick. At the same time, the driller would lift the block and the drill pipe elevators. When the elevators reached him, Viator was to push the pipe into the elevators and latch the elevators around the pipe. The bottom end of the pipe would be lifted off the drill floor so that the floor hands could put the bottom end of the pipe in the appropriate place. Viator had been working as derrick hand for about forty-five minutes prior to the accident. In that time he had missed or been unable to latch the pipe into the

elevators three times. Each of those times the pipe fell across the derrick. On the day of the accident, the driller, as was his usual practice, ran the block continuously, without stopping to allow the elevators to be latched. Viator took the end of one of the remaining stands of pipe and walked out to the end of the monkey board to move the top end of the pipe to the center of the derrick. His safety belt had become hooked on something. In getting it loose, he may have loosened its fit. The elevators rose to meet him. Viator attempted to shove the pipe into the elevators and latch the elevators. He was unable to close the latch. As the elevator continued to rise, the pipe began to fall. Viator grabbed the pipe to prevent it from falling across the derrick. He lost his balance and fell across the fingers. As a result, he injured his neck.

The parties dispute whether the accident occurred through improper operation of the rig or as a result of the negligence of Viator.

Viator testified that on the day of the accident, Thornton ran the block too fast for him. He had tripped about fifty stands of pipe before the accident. Of those, he had missed three because the upward rise of the elevators was so fast that the elevators were over the top end of the pipe before he could grab the pipe to restrain it. Those three stands fell across the derrick. When pipe fell across the derrick, it would take from three to eight minutes to get back to him if all went well. He stated that the latches were stiff on the day of the accident. There was no intercom so he motioned a floor hand to grease the latch. However, the floor hand apparently did not hear him because the latches were not greased. He went to get a pipe from the fingers. Coming back to the front of the

board, the rope to his safety belt got caught on a hook. He disentangled it and went out the remainder of the distance to the end of the board. As he stood ready, the block approached him. He made his final lean out to catch the block and noticed that he was able to lean out a bit further than usual. The block was coming very fast. He pushed the pipe into the elevator and slammed it shut. As the elevator went up, he saw that the latch was not closed so he grabbed the pipe with two hands to keep the pipe and himself from pulling off the left side of the board. As he stepped off the board onto the fingers to his left to brace himself, the pipe threw him off and he fell on his back on the fingers. He testified that he did not have time to signal the driller that the latch had not caught, that it was a split second decision to grab the pipe and that in another split second he had fallen. He admitted that it was his responsibility to make sure that his safety belt was the right length.

Allen Hebert was a floor hand on the Achilles at the time of Viator's accident. He has acted as a relief derrick hand. He testified that Thornton had a reputation for running the drill blocks fast and that in competitions for best crew, Thornton is the fastest. He stated that he has seen Thornton running the block so fast as to be unsafe. He further stated that a derrick hand can't tell the driller he is going too fast because the driller is in charge and, if he runs the block too fast, the derrick hand has to put up with it. He stated that when he is acting as relief derrick hand and the block is being run too fast for him, he just lets the block go by and the driller lowers it back into place so that he can latch the pipe. Hebert further testified that he was on the floor on the day of the accident

and could hear the latch catch on every piece of pipe from his position.

Roddy Romero, a floor hand on the Achilles, testified that Thornton was faster than other drillers. He further testified that he felt that Thornton was going faster than usual on the day of the accident.

Edward Robert, the plaintiff's expert in the field of rig safety, testified that Viator acted the way a derrick hand in the industry should act in the performance of his duties and conformed to proper practice in the industry. He further testified that the driller did not act properly. Robert opined that the driller should have been able to hear the elevators latch. If he failed to hear this, he should have been alerted that there was a problem and stopped the elevators before they reached the end of the pipe. He stated that the driller should always be able to stop the upward rise of the elevator before the latches go past the end of the pipe because this is the only control over the pipe. He opined that in failing to maintain control of the upward rise of the elevator, Thornton failed to perform according to the minimum expectation in the industry for a driller. He stated that failing to maintain control of the upward rise of the elevator latch so as to allow it to go past the end of the pipe is recognized in the industry as posing a hazard for personal injury.

Ken Kaigler, also a safety expert, testified that he found nothing wrong with the way the rig was run. However, he also testified that he could not fault Viator for his actions.

Charles Singleton testified for the defendants as an oil field safety expert. He testified that the driller acted in

accord with accepted oil field practices. He stated that he does not believe that the driller could have stopped the elevators before they reached the top of the pipe under the circumstances. He stated that a sudden stop will kink the line on the block. He opined that Viator placed himself at risk of injury by not letting go of the pipe sooner. However, he admitted that if the driller sees that the derrick hand is unable to secure the latch he should try to stop the upward motion of the elevators if he can do it without backlashing the drill line. He further admitted that the Falcon safety manual says not to allow your employees to hurry up to the point of being unsafe.

> In a trial where causation and credibility are major issues, a [trial judge's] findings of fact are entitled to great deference. *Ambrose v. New Orleans Police Ambulance Service*, 93-3099, 93-3110, 93-3112 (La.7/5/94); 639 So.2d 216; *reh'g denied*, 9/15/94. Those findings may not be overturned unless they are manifestly erroneous. *Stobart v. State*, 92-1328 (La.4/12/93); 617 So.2d 880. Moreover, when more than one competing view is permissible. as in this case, a fact finder's choice cannot be manifestly erroneous or clearly wrong. *Rosell v. Esco*, 549 So.2d 840 (La. 1989), *writ denied*, 561 So.2d 105 (La.1990).
>
> Before reversing a [fact finder's] conclusions of fact, an appellate court must satisfy a two step process based on the record as a whole: There must be no reasonable factual basis for the trial court's conclusions, and the finding must be clearly wrong. *Stobart v. State*, 92-1328 (La.4/12/93); 617 So.2d 880; *Weatherford v. Commercial Union Ins.*, 94-1793, 94-1927 (La.2/20/95); 650 So.2d 763.

Guillory v. Insurance Company of North America, 96-1084, p. 5 (La.4/8/97); 692 So.2d 1029.

After reviewing the testimony with regard to the fault of Falcon, we find that it supplies a reasonable factual basis for the trial court's conclusions. Further, the finding does not appear to be clearly wrong. Accordingly, we will not overturn the trial court's conclusion that Falcon was at fault in the injury to Viator.

UNSEAWORTHINESS

The defendants next allege that the trial court erred in finding that the Achilles was unseaworthy.

> To be seaworthy, a vessel and its appurtenances must be reasonably suited for the purpose or use for which they were intended. A vessel owner's duty to furnish a seaworthy ship is absolute and completely independent of the duty under the Jones Act to exercise reasonable care. To establish the requisite proximate cause in an unseaworthiness claim, a plaintiff must prove that the unseaworthy condition played a substantial part in bringing about or actually causing injury and that the injury was either a direct result or reasonably probable consequence of unseaworthiness. *Johnson v. Offshore Esp., Inc.*, 845 F.2d 1347 (5th Cir. 1988).

Cormier v. Cliff's Drilling Co., 93-1260, p. 4 (La.App. 3 Cir. 5/4/94); 640 So.2d 552, 555. A vessel crew engaging in unsafe work methods can constitute unseaworthiness. *Phillips v. Western Co. of North America*, 953 F.2d 923 (5th Cir. 1992).

"A factual finding of unseaworthiness by the trier of fact is reviewed under the clearly erroneous standard." *Foster v. Destin Trading Corp.*, 95-226 (La.App. 5 Cir. 2/27/96); 670 So.2d 1342, 1347 (citations omitted).

The record contains support for the conclusion that the crew of the Achilles engaged in unsafe work practices. Additionally, there is testimony to support the conclusion that the failure to have an intercom system between the driller and the derrick hand was unsafe and an unseaworthy condition. Accordingly, we will not disturb the trial court's finding that the Achilles was unseaworthy.

COMPARATIVE NEGLIGENCE OF VIATOR

The defendants argue that the trial court erred in finding Viator free from fault. Defendants argue that the accident resulted solely from the plaintiff's negligence. However, we have already found that the trial judge did not err in finding the defendants at fault in the accident. Therefore, although the defendants have not argued the issue, we will review the record to determine whether Viator was comparatively negligent and should be assessed with a portion of the fault.

"The determination and allocation of fault are subject to the manifest error – clearly wrong standard of review." *Adkinson v. Brookshire Grocery Co., Inc.*, 95-1021, p. 4 (La.App. 3 Cir. 1/31/96); 670 So.2d 453, 456 (citations omitted). Therefore, we will consider whether the record provides reasonable support for the trial court's determination that Viator was completely without fault in the

accident as well as whether the determination was clearly wrong. *Guillory*, 96-1084.

Singletary testified that Viator placed himself at risk of injury by not letting go of the pipe sooner. Thornton, however, testified that he thinks Viator did the right thing to grab the pipe. Kaigler testified that he could not fault Viator's conduct. Robert stated that Viator's conduct conformed to the proper practice in the industry. Having reviewed the entirety of the testimony and evidence on the issue, we conclude that there is sufficient evidence in the record to support the trial court's conclusion that Viator was not at fault in the accident. Further, we find no clear error in this conclusion. Therefore, the trial court's determination in this regard will not be overturned.

QUANTUM

The defendants argue that excessive damages were awarded for past and future pain and suffering, for future loss of income and/or earning capacity. The defendants also argue that the plaintiff's condition did not warrant the surgery which was performed.

1. Need for Surgery.

Although the defendants did not assign error in this regard and do not specifically so argue, we assume they wish to have the award for medical expenses reduced for this reason. After reviewing the record, we conclude that the surgery was, in fact, medically necessary. The testimony of the various physicians who treated Viator is

conflicting concerning Viator's need for surgery. However the record shows that Viator's condition improved as a result of the surgery. There is nothing of record to suggest that his condition would have improved equivalently without the surgery. This, in combination with the conflicting testimony, is enough to support the conclusion that the surgery was necessary. Therefore, we find no error in the trial judge's conclusion that the surgery was necessary.

2. Past and Future Pain and Suffering.

The supreme court in *Youn v. Maritime Overseas Corp.*, 623 So.2d 1257 (La.1993) explained the appropriate standard of review applicable to general damage awards:

> In *Reck v. Stevens*, 373 So.2d 498 (La.1979), this Court commented on appellate review of general damages awards and on the "much discretion" in fixing damages accorded to trial courts by La.Civ.Code art. 1934(3)(1870). The decision pointed out that the role of an appellate court in reviewing general damages is not to decide what it considers to be an appropriate award, but rather to review the exercise of discretion by the trier of fact. Each case is different, and the adequacy or inadequacy of the award should be determined by the facts or circumstances particular to the case under consideration.
>
> In *Reck*, this court disapproved the appellate court's simply reviewing the medical evidence and then concluding that the award for those injuries was excessive, without taking into consideration the particular effect of the particular

injuries on the particular plaintiff. This court further disapproved of the use of a scale of prior awards in cases with generically similar medical injuries to determine whether the particular trier of fact abused its discretion in the awards to the particular plaintiff under the facts and circumstances peculiar to the particular case. The initial inquiry is whether the award for the particular injuries and their effects under the particular circumstances on the particular injured person is a clear abuse of the "much discretion" of the trier of fact. *Gaspard v. LeMaire,* 245 La. 239, 158 So.2d 149 (1963); *Ballard v. National Indem. Co. of Omaha, Neb.,* 246 La. 963, 169 So.2d 64 (1964); *Lomenick v. Schoeffler,* 250 La. 959, 200 So.2d 127 (1967). Only after such a determination of an abuse of discretion is a resort to prior awards appropriate and then for the purpose of determining the highest or lowest point which is reasonably within that discretion. *Coco v. Winston Industries, Inc.,* 341 So.2d 332 (La.1976); *Bitoun v. Landry,* 302 So.2d 278 (La.1974); *Spillers v. Montgomery Ward & Co.,* 294 So.2d 803 (La.1974).

The standard for appellate review of general damage awards is difficult to express and is necessarily non-specific, and the requirement of an articulated basis for disturbing such awards gives little guidance as to what articulation suffices to justify modification of a generous or stingy award. Nevertheless, the theme that emerges from *Gaspard v. LeMaire,* 245 La. 239, 158 So.2d 149 (1963) through *Coco v. Winston Industries, Inc.,* 341 So.2d 332 (La.1976), and through *Reck* to the present case is that the discretion vested in the trier of fact is "great," and even vast, so that an appellate court should

> rarely disturb an award of general damages. Reasonable persons frequently disagree about the measure of general damages in a particular case. It is only when the award is, in either direction, beyond that which a reasonable trier of fact could assess for the effects of the particular injury to the particular plaintiff under the particular circumstances that the appellate court should increase or reduce the award.

Id. at 1260-61 (footnote omitted).

Viator was injured on November 1, 1993. On November 16, 1993, he saw Dr. Clifton Shepard, an orthopedic surgeon. Viator complained of neck, shoulder and back pain, as well as headaches. Based on the complaints, Dr. Shepard assumed Viator had a cervical and upper thoracic strain. He recommended medication and physical therapy. He continued to treat Viator until February 1994.

Dr. Ricardo Leoni treated Viator for headache and neck and low back pain through January 1994. Viator also underwent physical therapy. However, it exacerbated his condition.

Viator was next treated by Dr. John Cobb. In April 1995, Dr. Cobb performed surgery on Viator to fuse his spine at the C5-6 level. He last saw Viator on March 11, 1996. Viator had reached maximum medical improvement. Dr. Cobb opined that Viator would have occasional pain for the rest of his life. He further rated Viator's residual disability as a 12% to 14% impairment of the body as a whole.

Viator testified that the pain from the injury was relieved only by the surgery. He further testified that prior to the accident he lifted weights, fished and hunted

regularly. He hunted two or three times between the accident and the surgery. Before the surgery his family helped him with household chores and meals. He was unable to drive at all for three months after the surgery. He states that he still has pain in his neck about twice a week. He is still restricted from crawling, climbing, heavy lifting, and boat riding. He cannot sit for long periods.

Considering the circumstances, we cannot say that the general damage award constitutes an abuse of the trial judge's discretion.

3. Future Lost Wages/Loss of Earning Capacity.

The defendants next argue that the award of $225,000 in future lost wages and/or loss of earning capacity was excessive.

> The manifest error rule governs the review of awards for loss of earning capacity. *Detraz v. Hartford Accident & Indemnity Co.*, 94-708 (La.App. 3 Cir. 12/7/94); 647 So.2d 576. The appellate question is not whether a different award may have been more appropriate, but whether the trial court's award can be reasonably supported by the record. *Id.*

Samuel B. Trahan v. Savage Industries, Inc., 96-1239, p. 10 (La.App. 3 Cir. 3/5/97); 692 So.2d 490.

Here, Kenneth Boudreaux, the defendant's expert economist, testified that if the plaintiff were employed in the future at minimum wage, he would have a loss of earnings or earning capacity of $212,248.41. He further testified that if Viator were employed at a middle range

wage, his loss would be $161,417.00. In reaching his figures, Boudreaux relied on the Camus study of work life expectancy of oil field workers.

The plaintiff's expert economist, Douglas Womack, disputed the Boudreaux's figures. He felt that reliance on the Camus study rendered Boudreaux's conclusions inaccurate. He stated that the Camus study was not statistically reliable for calculating work-life expectancy. He stated that it was never published and not subjected to peer review. Further, he stated that the sample used was insufficient to be statistically accurate: the study included only nine companies in the central Gulf Coast region during three years when the oil industry was in decline. Further, he felt the study was inaccurate because it assumed that everyone leaving any one of the nine companies studied during the three year period left oil field work completely. Boudreaux admitted that if there is an income earning ability that is affected beyond the offshore work life then the regular work-life tables must be used as the total loss period.

Womack calculated the loss of wages or earning capacity at $469,593.00 if Viator returned to work at $5.00 per hour; $452,116.00 at $5.50 per hour; $449,855.00 at $7.00 per hour; and $344,784.00 at $7.50 per hour. He projected a higher inflation rate over the next twenty-five years than did the defendant's expert. Further, he included a higher figure for loss of fringe benefits.

The defendants' rehabilitation expert, Denise Perry, opined that the plaintiff could earn in excess of $7.00 per hour at jobs available to him in the local market or for which he could be trained. Glenn Hebert, a rehabilitation

consultant who testified for the plaintiff, testified that many of the job possibilities put forward by Perry were either not within the limitations imposed on Viator by his doctor or required training which did not interest Viator. He felt that it set a person up for failure to force him to attempt training that did not interest them. Hebert opined that if Viator remains in New Iberia, where he now lives, he will most likely earn wages of approximately $5.50 per hour and that if he goes to Lafayette he might earn $6.00 per hour.

Considering the entirety of the evidence of record, we find that the award of $225,000.00 for future lost wages/loss of earning capacity had adequate evidentiary support. We cannot say that the award was clearly wrong. Therefore, the award will not be overturned.

EXPERT WITNESS FEES

Finally, the defendants argue that the trial court erred by setting excessive fees for the plaintiff's experts.

> The fixing of expert witness fees is largely within the sound discretion of the trial court, and, on appeal, we may not reverse the trial court's fixing thereof absent an abuse of discretion. In fixing expert witness fees, each case must turn on its own peculiar facts and circumstances. However, the jurisprudence has provided us with factors to consider such as the amount of time consumed by the experts in compiling their reports; the amount charged [for the services]; the amount of time spent in preparing for trial; the amount of time actually spent in court; the expertise of the expert; . . . the amount involved in the award; and the

> degree to which the expert's opinion aided the court in its decision.

Trans Louisiana Gas Co. v. Heard, 629 So.2d 500, 505 (La.App. 3 Cir. 1993).

In this case the trial court awarded $2,000.00 to Dr. Cobb, $1,000.00 to Dr. LaBorde, $1,962.00 to Dr. Womack, and $2,500.00 to Glenn Heber, Inc. While these fees are high, we cannot say they are excessive, given the time consumed compiling reports, preparing for testimony, and in actually testifying the relevance of their testimonies to the various disputed points before the court and the amount of the award herein. Therefore, the fee awards will not be overturned.

CONCLUSION

For these reasons, the judgment of the trial court is affirmed. Costs of this appeal are assessed to the defendants.

AFFIRMED.

Amy, J., concurs in the result.

EXHIBIT B

PATRICK VIATOR VERSUS	15TH JUDICIAL DISTRICT COURT
LIVERPOOL AND LONDON STEAMSHIP PROTECTION INDEMNITY ASSOCIATION, FALCON DRILLING COMPANY, INC. AND FALRIG OFFSHORE (U.S.A.), L.P.	VERMILION PARISH, LOUISIANA DOCKET NO.: 95-65818 2A

****

RULING

This matter was tried on the merits April 2 through April 4, 1996. Present in court for the trial were plaintiff, Patrick Viator, with his attorney James Roy. The defendants, Falcon Drilling Company, Inc., Falrig Offshore (U.S.A.), L.P. and Liverpool & London Steamship Protection & Indemnity Association were represented by Edwin Preis, Charles Mouton and Richard Hymel. Upon completion of the trial, the parties were allowed time within which to file post-trial briefs and rebuttal briefs.

After consideration of the pleadings filed herein, the evidence presented at the trial of this matter, the briefs filed by the parties and the applicable law, the court finds that the plaintiff, Patrick Viator, proved by a preponderance of the evidence that on November 13, 1993, he was a Jones Act seaman and that he was injured while in furtherance of the mission of the jackup rig ACHILLES. Further, the court finds that Mr. Viator's injuries resulted from the negligence of his employer, Falcon Drilling

Company, Inc., and the unseaworthiness of the ACHILLES.

The defendants contend that Patrick Viator's negligence was the legal cause of his injuries. The court finds that Mr. Viator was not negligent in his work that day.

As a result of the accident that occurred on November 16, 1993, Patrick Viator suffered an injury to his neck, a lesion at C5-6. Mr. Viator attempted to relieve the pain he suffered from his injury with conservative treatment, however, he continued to suffer with severe pain. His treating physician, Dr. John Cobb, felt that the pain could be relieved with surgery. Dr. Cobb performed surgery; the defendants contend that the surgery was unnecessary and Mr. Viator should not be reimbursed for the expenses associated with it. After the surgery Mr. Viator experienced relief from the pain that he had been having since his injury. In light of the positive result of the surgery, the court is of the opinion that the surgery performed upon Mr. Viator by Dr. Cobb was medically necessary.

Mr. Viator is entitled to recover the following damages to compensate him for the injuries he suffered because of the injuries he received on November 16, 1993.

Past medical expenses	$ 19,593.25
Past lost income	55,586.00
Future lost income/loss of earning capacity	225,000.00
Past, present and future physical and mental pain and suffering, permanent disability and loss of enjoyment of life	250,000.00

The award is to be reduced by the sum of $11,935.00, which is the amount the parties stipulated defendants paid to Mr. Viator as advances on salary. Legal interest is owed to Mr. Viator on the amount of $63,244.25 from November 16, 1993, until paid; legal interest on the remaining amounts owed is due from April 2, 1996, until paid. All costs are to be paid by defendants.

Judgment in accordance with this ruling is to be prepared by counsel for plaintiff and submitted to counsel for defendants for approval as to form. Judgment in conformity with this ruling will be signed upon submission.

Signed this 21 day of August, 1996, at Lafayette, Louisiana.

/s/ Allen M. Babineaux
District Judge

PATRICK VIATOR VERSUS	15TH JUDICIAL DISTRICT COURT
LIVERPOOL AND LONDON STEAMSHIP PROTECTION INDEMNITY ASSOCIATION, FALCON DRILLING COMPANY, INC. AND FALRIG OFFSHORE (U.S.A.), L.P.	VERMILION PARISH, LOUISIANA DOCKET NO.: 95-65818 2A

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AMENDED RULING

A ruling was issued in this matter on August 21, 1996. Following the ruling it was brought to the court's attention that the recent decision in *Milstead v. Diamond M Offshore, Inc.* 676 So.2d 89 (La. 1996), affects the ruling issued herein. The *Milstead* case held that when a general maritime claim under the Jones Act and the "saving to suitors" clause is tried before a judge, the judge must apportion damages into past and future damages. This court's ruling did not apportion the general damages awarded to plaintiff. Accordingly, the ruling must be amended.

The paragraph in which the damage award is contained is amended to read as follows:

> Mr. Viator is entitled to recover the following damages to compensate him for the injuries he suffered because of the injuries he received on November 16, 1993:
>
> | | |
> |---|---|
> | Past medical expenses | $ 19,593.25 |
> | Past lost income | 55,586.00 |

Future lost income/loss of earning capacity	225,000.00
Past physical and mental pain and suffering, permanent disability and loss of enjoyment of life	100,000.00
Future physical and mental pain and suffering, permanent disability and loss of enjoyment of life	150,000.00

The ruling remains the same in all other respects.

Judgment in accordance with the original ruling and this amended ruling is to be prepared by counsel for plaintiff and submitted to counsel for defendants for approval as to form. Judgment in conformity with these rulings will be signed upon submission.

Signed this 22 day of August, 1996, at Lafayette, Louisiana.

/s/ Allen M. Babineaux
District Judge

PATRICK VIATOR VERSUS LIVERPOOL AND LONDON STEAMSHIP PROTECTION INDEMNITY ASSOCIATION, FALCON DRILLING COMPANY, INC. AND FALRIG OFFSHORE (U.S.A.), L.P.	15TH JUDICIAL DISTRICT COURT VERMILION PARISH, LOUISIANA DOCKET NO.: 95-65818 2A

****

SECOND AMENDED RULING

Pursuant to the ruling *Milstead v. Diamond M Offshore, Inc.* 676 So.2d 89 (La. 1996), an amended ruling was issued herein on August 21, 1996. An error was made in the amended ruling; the court failed to correct the ruling as to interest to be paid on the damage awards. Accordingly, the amended ruling must be corrected.

The paragraphs containing the damage awards and the interest awards are amended to read as follows:

> Mr. Viator is entitled to recover the following damages to compensate him for the injuries he suffered because of the injuries he received on November 16, 1993:
>
> | | |
> |---|---|
> | Past medical expenses | $ 19,593.25 |
> | Past lost income | 55,586.00 |
> | Future lost income/loss of earning capacity | 225,000.00 |

Past physical and mental pain and suffering, permanent disability and loss of enjoyment of life	100,000.00
Future physical and mental pain and suffering, permanent disability and loss of enjoyment of life	150,000.00

The award is to be reduced by the sum of $11,935.00, which is the amount the parties stipulated defendants paid to Mr. Viator as advances on salary. Legal interest is owed to Mr. Viator on the amount of $163.[sic]244.25 from November 16, 1993, until paid: legal interest on the remaining amounts owed is due from April 2, 1996, until paid. All costs are to be paid by defendants.

The ruling remains the same in all other respects.

Judgment in accordance with the rulings issued herein is to be prepared by counsel for plaintiff and submitted to counsel for defendants for approval as to form. Judgment in conformity with these rulings will be signed upon submission.

Signed this 3 day of Sept. 1996, at Lafayette, Louisiana.

/s/ Allen M. Babineaux
District Judge

PATRICK VIATOR VERSUS LIVERPOOL AND LONDON STEAMSHIP PROTECTION INDEMNITY ASSOCIATION, FALCON DRILLING COMPANY, INC. AND FALRIG OFFSHORE (U.S.A.), L.P.	15TH JUDICIAL DISTRICT COURT VERMILION PARISH, LOUISIANA DOCKET NO.: 95-65818 2A

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RULING

A request for written findings of fact and reasons for judgment has been made by the defendants. After review of the request and Article 1917 of the Code of Civil Procedure, the court is of the opinion that the request has been satisfied by the court's issuance of the ruling herein. The ruling and the amendments thereto make findings of fact regarding the claims of the plaintiff and the defenses urged by the defendants; these findings are the reasons the court ruled in plaintiff's favor. This is precisely what Article 1917 mandates be done in a case that is tried before a judge. Accordingly, the court finds the request is moot.

Signed the 16 day of September, 1996, at Lafayette, Louisiana.

/s/ Allen M. Babineaux
District Judge

PATRICK VIATOR VERSUS	15TH JUDICIAL DISTRICT COURT
LIVERPOOL AND LONDON STEAMSHIP PROTECTION INDEMNITY ASSOCIATION, FALCON DRILLING COMPANY, INC. AND FALRIG OFFSHORE (U.S.A.), L.P.	VERMILION PARISH, LOUISIANA DOCKET NO.: 95-65818 2A

****

RULING

A hearing was held in this matter on November 19, 1996, pursuant to a motionfor [sic] new trial filed by the defendants and a motion to tax as court costs. Present for the hearing were Vivian Newmann [sic] on behalf of the plaintiff, Patrick Viator, and Richard Himel [sic] on behalf of the defendants, Falcon Drilling Company, Inc., Falrig Offshore (U.S.A.), L.P. and Liverpool & London Steamship Protection & Indemnity Association.

After consideration of the motion for new trial, the arguments of the parties and the applicable law, the court denies the motion.

With regard to the motion to tax as court costs, there are 14 costs which plaintiff seeks to have taxed as court costs in this matter. At the hearing the defendants stated that they do not have objections to the following costs: 1, 2, 8, 9, 11. Accordingly, these expenses are taxed as court costs.

Further, the defendants do not object to $450.00 of the court reporter costs in 5 or to any of the costs in 10, except for Dr. Clifford's deposition expense. The court disagrees with these objections and taxes $1,715.50 and $406.20, respectively, as court costs.

The only objection of defendants to the expert witness fees in 3, 4, 6, 12 and 13 is reasonableness. The court sets the following amounts as expert witness fees:

3.	Dr. John Cobb	$2,000.00
4.	Dr. Jeff LaBorde	$1,000.00
6.	Edward B. Robert, Jr.	$2,500.00
12.	R. Douglas Womack, Ph.d.	$1,962.00
13.	Glenn Hebert, Inc.	$2,500.00

Defendants object to all costs associated with Kaigler Consulting Services because Mr. Kaigler was not called by plaintiff at the trial of this matter. See item 7. The court agrees with this objection and will not tax any of Kaigler Consulting Services' fees as court costs.

Plaintiff argues that the defendants are also responsible for interest on all court costs. The court agrees and awards interest on all court costs from the date of judgment taxing court costs herein until paid.

Judgment in accordance with this ruling is to be prepared by counsel for plaintiff and submitted for review to counsel for defendants. Upon presentation to the court judgment in conformity herewith will be signed.

Signed this 26 day of November, 1996, at Lafayette, Louisiana.

/s/ Allen M. Babineaux
District Judge

PATRICK VIATOR	15TH JUDICIAL DISTRICT COURT
VERSUS	
LIVERPOOL AND LONDON STEAMSHIP PROTECTION INDEMNITY ASSOCIATION, FALCON DRILLING COMPANY, INC. AND FALRIG OFFSHORE (U.S.A.), L.P.	VERMILION PARISH, LOUISIANA
	DOCKET NO.: 95-65818 2A

****

JUDGMENT

(Filed Dec. 16, 1996)

This matter came before the Honorable Allen Babineaux as a Motion for New Trial filed on behalf of Defendants and a Motion to Tax as Court Costs filed on behalf of the Plaintiff on Tuesday, November 19, 1996, in Abbeville, Louisiana.

PRESENT: VIVIAN VERON NEUMANN, Attorney for Plaintiff; and

RICHARD HYMEL, Attorney for LIVERPOOL AND LONDON STEAMSHIP PROTECTION INDEMNITY ASSOCIATION, FALCON DRILLING COMPANY, INC., AND FALRIG OFFSHORE (U.S.A.), L.P.

After hearing the evidence, the stipulations of the parties, and arguments of counsel, the Court, considering the law and evidence, and for the reasons assigned in the Court's Ruling dated November 26, 1996:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendants' Motion for New Trial is *DENIED.*

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that on Plaintiff's Motion to Tax as Court Costs, the Defendants shall be taxed with all court costs of record with the Clerk of Court in connection with this matter, as well as the following additional costs which shall also be taxed as court costs; and the Clerk of Court is ordered to so note in its records of this case:

Acadian Consultants, Inc.	$ 83.05
Dr. John Cobb	$ 2,000.00
Dr. Jeff LaBorde	$ 1,000.00
Margaret D. Duhon, Certified Court Reporter	$ 1,715.50
Edward B. Robert, Jr.	$ 2,500.00
Social Security Administration	$ 40.00
Smart Corporation	$ 15.71
Kaufman & Associates	$ 406.25
Le Copier Centre, Inc.	$ 271.95
R. Douglas Womack, Ph.D. (Expert)	$ 1,962.00
Glenn Hebert, Inc. (Expert)	$ 2,500.00
TOTAL ADDITIONAL ASSESSED COSTS:	$12,494.46

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendants shall pay interest on all amounts taxed as court costs from the date this Judgment is signed, until paid.

SIGNED this 13 day of December, 1996, in Lafayette Louisiana.

/s/ Allen M. Babineaux
ALLEN M. BABINEAUX
DISTRICT JUDGE

APPROVED AS TO FORM:

DOMENGEAUX, WRIGHT, MOROUX & ROY

/s/ James Parkerson Roy
JAMES PARKERSON ROY (#11511)
VIVIAN VERON NEUMANN (#20624)
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(318) 233-3033
Counsel for PLAINTIFF

PREIS, KRAFT & ROY

/s/ Richard J. Hymel
EDWIN G. PREIS, JR. (#10703)
CHARLES A. MOUTON (#17721)
RICHARD J. HYMEL (#20230)
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P.O. Drawer 94-C
Lafayette, LA 70509
(318) 237-6062

Counsel for LIVERPOOL AND LONDON STEAMSHIP PROTECTION INDEMNITY ASSOCIATION, FALCON DRILLING COMPANY, INC., AND FALRIG OFFSHORE (U.S.A.), L.P.

EXHIBIT C

PATRICK VIATOR	*	15TH JUDICIAL
VERSUS	*	DISTRICT COURT
LIVERPOOL & LONDON STEAMSHIP PROTECTION AND INDEMNITY ASSOCIATION, FALCON DRILLING COMPANY, INC. and FALRIG OFFSHORE (U.S.A.), INC.	*	PARISH OF VERMILION
	*	STATE OF LOUISIANA
	*	DOCKET NO.: 95-65818 "2A"

****

JUDGMENT

(Filed Sept. 25, 1996)

This matter was tried on the merits April 2 through April 4, 1996. Present in court for the trial were plaintiff, PATRICK VIATOR, with his attorney James Parkerson Roy. The defendants, FALCON DRILLING COMPANY, INC., FALRIG OFFSHORE (U.S.A.) L.P. and LIVERPOOL & LONDON STEAMSHIP PROTECTION & INDEMNITY ASSOCIATION were represented by Edwin Preis, Charles Mouton and Richard Hymel.

After consideration of the pleadings filed herein, the evidence presented at the trial of this matter, the briefs filed by the parties and the applicable law;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of plaintiff, PATRICK VIATOR, in the amount of *$550,179.25*

over and against defendants FALCON DRILLING COMPANY, INC., FALRIG OFFSHORE (U.S.A.) L.P. and LIVERPOOL & LONDON STEAMSHIP PROTECTION & INDEMNITY ASSOCIATION.

Said damages are allocated as follows:

Past medical expenses	$19,593.25
Past lost income	$55,586.00
Future lost income/loss of earning capacity	$225,000.00
Past, physical and mental pain and suffering, permanent disability and loss of enjoyment of life	$100,000.00
Future, physical and mental pain and suffering, permanent disability and loss of enjoyment of life	$150,000.00
TOTAL	$550,179.25

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendants are entitled to a credit of $11,935.00 paid to PATRICK VIATOR as advances on salary.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that legal interest is owed to PATRICK VIATOR on all past damages from November 16, 1993, until paid and legal interest on all future damages from April 2, 1996, until paid; all costs are to be paid by defendants.

SIGNED this 24 day of Sept., 1996, at Lafayette, Louisiana.

/s/ Allen M. Babineaux
DISTRICT JUDGE

APPROVED AS TO FORM:

DOMENGEAUX, WRIGHT, MOROUX & ROY

BY: /s/ James Parkerson Roy
JAMES PARKERSON ROY
556 Jefferson St., Suite 500
Post Office Box 3668
Lafayette, Louisiana 70502
(318) 233-3033
ATTORNEYS FOR PLAINTIFF

PREIS, KRAFT & ROY

BY: /s/ Charles A. Mouton
RICHARD J. HYMEL
CHARLES A. MOUTON
Post Office Drawer 94-C
Lafayette, Louisiana 70509
(318) 237-6062
ATTORNEYS FOR DEFENDANTS

EXHIBIT D

PATRICK VIATOR	*	DOCKET NUMBER
VERSUS	*	95-65818-2A
LIVERPOOL AND LONDON STEAMSHIP PROTECTION AND INDEMNITY ASSOCIATION, FALCON DRILLING COMPANY, INC. AND FALRIG OFFSHORE (U.S.A.), L.P.	*	15TH JUDICIAL DISTRICT COURT
	*	VERMILION PARISH, LOUISIANA

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MOTION FOR SUSPENSIVE APPEAL

(Filed Dec. 5, 1996)

NOW INTO COURT, through undersigned counsel, come defendants, FALCON DRILLING COMPANY, INC., FALRIG OFFSHORE (U.S.A.) L.P. and LIVERPOOL & LONDON STEAMSHIP PROTECTION & INDEMNITY ASSOCIATION, who desire to suspensively appeal from the Judgment Judgment [sic] rendered in the above cause upon suggesting to the Court that:

1.

Judgment was rendered on September 24, 1996 against defendants in the total amount of FIVE HUNDRED FIFTY THOUSAND ONE HUNDRED SEVENTY-NINE AND 25/100 ($550,179.25) DOLLARS plus legal interest to the plaintiff, PATRICK VIATOR on all past damages from November 16, 1993 until paid and all

future damages from April 2, 1996 until paid, and all court costs. The Judgment further provided that defendants were entitled to a credit of ELEVEN THOUSAND NINE HUNDRED THIRTY-FIVE AND NO/100 ($11,935.00) DOLLARS paid to PATRICK VIATOR as advances on salary.

2.

Following the rendition of the Judgment, defendants filed a Motion for New Trial. By Minute Entry dated November 26, 1996, the Motion for New Trial was denied.

3.

As provided for in Article 2124B(1) of the Louisiana Code of Civil Procedure, defendants request that this Honorable Court set the amount of security equal to the amount of the Judgment including interest allowed by the Judgment to the date the security is furnished, exclusive of costs. Defendants respectfully suggest that SIX HUNDRED FOUR THOUSAND EIGHT HUNDRED EIGHTY-EIGHT AND 88/100 ($604,888.88) DOLLARS is an appropriate amount for security.

4.

Defendants also request the Court to set a return day of the appeal in the Appellate Court pursuant to Louisiana Code of Civil Procedure, Article 2121 and set the amount of the suspensive appeal bond in accordance with Louisiana Code of Civil Procedure Article 2124(c).

WHEREFORE, defendants, FALCON DRILLING COMPANY, INC., FALRIG OFFSHORE (U.S.A.) L.P. and LIVERPOOL & LONDON STEAMSHIP PROTECTION & INDEMNITY ASSOCIATION, respectfully move the Court for an Order granting a suspensive appeal from the aforementioned Judgment, setting the amount of security and setting the return date.

Respectfully submitted,

PREIS, KRAFT & ROY
(A Professional Law Corporation)

BY: /s/ Charles A. Mouton
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(#17721)
RICHARD J. HYMEL (#20230)
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Lafayette, LA 70509
Phone: (318) 237-6062

Counsel for FALCON DRILLING COMPANY, INC., FALRIG OFFSHORE (U.S.A.), L.P. and LIVERPOOL & LONDON STEAMSHIP PROTECTION & INDEMNITY ASSOCIATION

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has this date been served on all counsel of record in this proceeding by:

( ) Hand Delivery (✓) Prepaid U.S. Mail

( ) Facsimile ( ) Federal Express

Lafayette, Louisiana this 5th day of December, 1996.

/s/ Charles A. Mouton
CHARLES A. MOUTON

PATRICK VIATOR	*	DOCKET NUMBER
VERSUS	*	95-65818-2A
LIVERPOOL AND LONDON STEAMSHIP PROTECTION AND INDEMNITY ASSOCIATION, FALCON DRILLING COMPANY, INC. AND FALRIG OFFSHORE (U.S.A.), L.P.	*	15TH JUDICIAL DISTRICT COURT
	*	VERMILION PARISH, LOUISIANA

****

ORDER

(Filed Dec. 5, 1996)

Considering the foregoing Motion by defendants, FALCON DRILLING COMPANY, INC., FALRIG OFFSHORE (U.S.A.), L.P. AND LIVERPOOL & LONDON STEAMSHIP PROTECTION & INDEMNITY ASSOCIATION;

IT IS ORDERED that a suspensive appeal from the Judgment dated September 24, 1996 be granted to defendants, FALCON DRILLING COMPANY, INC., FALRIG OFFSHORE (U.S.A.), L.P. AND LIVERPOOL & LONDON STEAMSHIP PROTECTION & INDEMNITY ASSOCIATION, returnable to the Court of Appeal, Third Circuit, on the 15th day of Jan., 1997, upon the furnishing of bond with good and solvent surety, conditioned as the law directs, in the amount of $750,000.

Lafayette, Louisiana, this 9 day of December, 1996.

/s/ Allen M. Babineaux
DISTRICT JUDGE
PARISH OF VERMILION

EXHIBIT E

The Supreme Court of the State of Louisiana

PATRICK VIATOR

VS. NO. 98-C - 0027

LIVERPOOL & LONDON STEAMSHIP PROTECTION AND INDEMNITY ASSOCIATION, FALCON DRILLING COMPANY, INC. AND FALRIG OFFSHORE (U.S.A.), INC.

IN RE: Liverpool/LondonShp.Pro.Indem.; Falcon Drilling Co. Inc.; Falrig Offshore (U.S.A.) Inc.; – Defendant(s); Applying for Writ of Certiorari and/or Review; to the Court of Appeal, Third Circuit, Number CA97-0264; Parish of Vermilion 15th Judicial District Court Div. "A" Number 95-658182A

March 13, 1998

Denied.

HTL

PFC

CDK

CDT

JTK

MARCUS, J. would grant the writ.

JOHNSON, J. not on panel.

VICTORY, J. would grant the writ.

Supreme Court of Louisiana
March 13, 1998

/s/ Illegible
Clerk of Court
For the Court

EXHIBIT F

[SEAL]

Supreme Court
STATE OF LOUISIANA
New Orleans
March 25, 1998

PASCAL F. CALOGERO, JR.
CHIEF JUSTICE

JOHN TARLTON OLIVIER
CLERK OF COURT

301 LOYOLA AVENUE
NEW ORLEANS, LA 70112

TELEPHONE (504) 568-5707
HOME PAGE http: www.lasc.org

Edwin Gustav Preis Jr. Esq.
PREIS & KRAFT
102 Versailles Blvd.
Suite 400
P.O. Box 94-C
Lafayette LA 70509

In Re: Viator, Patrick
vs. Liverpool/LondonShp.Pro.Indemn.
No: 98-C - 0027

Dear Counsel:

This is to advise that the Court took the following action on the Motion for Stay Pending Application to the United States Supreme Court with regards to the above entitled matter:

"Motion denied."

With kindest regards, I remain,

Very truly yours,

John Tarlton Olivier
Clerk of Court

/s/ Theophile A. Duroncelet
By: Theophile A. Duroncelet
Deputy Clerk of Court

TAD:rtd

ccs: Bob F. Wright Esq.
Carla Marie Perron Esq.
Charles A. Mouton Esq.
Richard J. Hymel Esq.
James Parkerson Roy Esq.

Court of Appeal, Third Circuit, Number CA97-0264 15th Judicial District Court Div. "A" Number 95-658182A

EXHIBIT G

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

April 1, 1998

Mr. Edwin, Jr. Preis
Versailles Centre Suite 400
102 Versailles BLVD.
Lafayette, LA 70509

Re: Falcon Drilling Co., et al.
v. Patrick Viator
Application No. A-730

Dear Mr. Preis:

The application for a stay of execution of judgment pending the filing and disposition of a petition for a writ of certiorari in the above-entitled case has been presented to Justice Scalia, who on April 1, 1998 denied the application.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By /s/ Cynthia Rapp
Cynthia Rapp
Assistant Clerk

NOTIFICATION LIST

Mr. Edwin, Jr. Preis
Versailles Centre Suite 400
102 Versailles BLVD.
Lafayette, LA 70509

Mr. James Roy
556 Jefferson Street
Suite 500
Layfayette, LA 70502

EXHIBIT H

Office of the Clerk
COURT OF APPEAL, THIRD CIRCUIT
STATE OF LOUISIANA
P.O. BOX 3000
LAKE CHARLES, La 70602
(318) 433-9403

Kenneth J. deBlanc
Clerk
Charles K. McNeely
Chief Deputy Clerk

Barbara B. Cox
Deputy Clerk – Civil
Roberta D. Burnett
Deputy Clerk – Criminal

PARTICK VIATOR

Versus

No. 97 00264

LIVERPOOL & LONDON STEAMSIP, ET AL

BEFORE: NED OAD MTA

ORDER

The Application for Rehearing herein having been duly considered: IT IS ORDERED that a Rehearing be, and the same is hereby, DENIED.

Lake Charles, Louisiana.

DECEMBER 8, 1997

/s/ NED
/s/ OAD
/s/ MTA
Judges

Amy, J., would grant.

Kenneth J. deBLANC
Clerk

(2)

Supreme Court, U.S.
FILED
JUN 25 1998
OFFICE OF THE CLERK

No. 97-1978

In The

Supreme Court of the United States

October Term, 1997

FALCON DRILLING COMPANY, INC.,
FALRIG OFFSHORE (U.S.A.), L.P. and
LIVERPOOL & LONDON STEAMSHIP PROTECTION
& INDEMNITY ASSOCIATION,

Petitioners,

versus

PATRICK VIATOR,

Respondent.

On Petition For Writ Of Certiorari
To The Third Circuit Court Of Appeal
Third Circuit, State Of Louisiana

RESPONDENT'S BRIEF IN OPPOSITION

James Parkerson Roy*
Bob F. Wright
Carla M. Perron
Domengeaux, Wright & Roy
556 Jefferson Street,
Fifth Floor
Lafayette, LA 70502
(318) 233-3033
Counsel for Respondent
Patrick Viator
**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

19 pp

QUESTION PRESENTED

Did the Louisiana Court of Appeal for the Third Circuit violate the principles of uniformity recognized by this Court as necessary in application of the Jones Act, 46 USC Sec. 688 et seq., and deny Petitioners' substantive federal rights by failing to apply the same standards of contributory negligence and employer fault under the Jones Act recognized by the United States Court of Appeals for the Fifth Circuit?

PARTES AND LIST PURSUANT TO RULE 29.1

The parties as stated in Pet. Cert. ii.

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BRIEF IN OPPOSITION

Respondent respectfully prays that the petition for a writ of certiorari to the Supreme Court of the United States be denied.

OPINIONS BELOW

The opinion of the Third Circuit Court of Appeals, State of Louisiana is reported at 701 So.2d 487, 97-264 La. App. 3 Cir. 10/8/87 (La. App. 3 Cir. 1997) as is reproduced at Pet.App.1.

JURISDICTION

As will be shown, there is no jurisdictional basis for this Court to entertain the Petition for Writ of Certiorari. First, no substantive rights were denied the Petitioners and secondly, no conflict exists between the state and federal courts.

STATEMENT OF THE CASE

The facts as recited in the Petition are, of course, skewed in the best light for the Petitioners. While the merits of this case are not at issue, it is mandatory under Supreme Court Rule 15 that Respondent point out to the Court any misstatements of fact. Petitioners' omitting of certain facts adduced at the trial of this case amounts to a misstatement and fails to provide an adequate, much less an acceptable, depiction of the case.

Specifically, at p. 19 of Petitioners' brief, it states, " . . . Mr. Viator allowed too much slack to exist in his safety belt and he lost his balance." However, there was no evidence of how less slack would have prevented the accident. Rather, testimony from Mr. Viator shows that it was the weight of the pipe and the actions of the Driller that threw him off balance. Likewise, testimony from the regular derrick hand indicated that the belts should be adjusted to allow you to walk from side to side or back and forth. Finally, a photograph was shown to Mike Chambliss, the regular derrick hand who also worked on the rig with Respondent. The photograph was of a Derrickman with his safety belt on, leaning out, and latching the latches in a position similar to that of the plaintiff at the time of the accident. Chambliss testified that the Derrickman in that picture was not leaning out too far. Similarly, the driller, Respondent's own boss, Donald Thornton, also testified the same way when shown a similar photograph, and admitted that the Respondent was not leaning out too far.

Next, Petitioners stated "[h]e then attempted to grab the pipe to prevent himself from falling, rather than allowing the pipe to fall. . . . " Thornton testified that the Mr. Viator did nothing wrong and that Mr. Viator did the right thing in trying to hold onto the pipe. The experts for both parties agreed that Mr. Viator acted appropriately.

Petitioners omit the fact that the trial judge found the ACHILLES unseaworthy in addition to its finding of Jones Act negligence. The Third Circuit Court of Appeal affirmed that finding, citing the failure to have an intercom system between the driller and the derrick man as an

unsafe and unseaworthy condition. *Patrick Viator v. London Steamship Protection and Indemnity Association, et al.*, 701 So.2d 487, 495 (La.App. 3rd Cir.1997), *writ denied*, 1998 WL 181651 (La. 1998).

Finally, the defendants have paid the judgment in exchange for Satisfaction of Judgment executed on April 6, 1998 and filed into the trial court record on May 6, 1998. *Resp. App. 1.*

REASONS FOR DENYING THE WRIT

The issue in the present case is narrow and no amount of rhetoric can convert it into one warranting review on certiorari. As will be shown, there is no important question of a constitutional nature requiring review by this Court and no substantive rights were denied the Petitioners. The present decision of the Louisiana Third Circuit Court of Appeal is fully in accord with the reasonable prudent standards of negligence applicable to both parties in this case.

Socony-Vacuum Oil Co., Inc. v. Smith

To place this case in perspective, it is necessary to understand the underpinnings of the special treatment accorded to "seaman" by the Courts and Congress. The Respondent was a Jones Act seaman when he was injured on the vessel ACHILLES. Nearly 60 years ago, in *Socony-Vacuum Oil Co., Inc. v. Smith*, 59 S.Ct. 262, 305 U.S. 424 (1939), this Court noted that

> the seaman, while on his vessel, is subject to the rigorous discipline of the sea and has little

> opportunity to appeal to the protection from abuse of power which the law makes readily available to the landsman. His complaints to superior officers of unsafe working conditions not infrequently provoke harsh treatment. He cannot leave the vessel while at sea. Abandonment of it in port before his discharge, to avoid unnecessary dangers of employment, exposes him to the risk of loss of pay and to the penalties for desertion. In the performance of duty he is often under the necessity of making quick decisions with little opportunity or capacity to appraise the relative safety of alternative courses of action. Withal, seamen are the wards of the admiralty, whose traditional policy it has been to avoid, within reasonable limits, the application of rules of the common law which would affect them harshly because of the special circumstances attending their calling. It is for this reason that remedial legislation [the Jones Act] for the benefit and protection of seamen has been liberally construed to attain that end.

59 S.Ct. 262, 266 (Internal citations omitted)

Gautreaux v. Scurlock

The U.S. Fifth Circuit case of *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331 (5th Cir.1997), settled previous jurisprudence with respect to the duty of care owed by both the employer and employee-seaman in a Jones Act case. Simply, the employer and employee are each obligated to act according to the reasonable person standard. The duty owed by each is to act with ordinary reasonable prudence under a given set of circumstances. Thus, the

prior distinction between an employer's "slightest negligence" as opposed to the seaman's "gross negligence" is no longer viable. In short, *Gautreaux* raised in degree the standard by which a seaman's contributory negligence is measured from "slight duty of care" to "ordinary prudence under the circumstances." *Id.* at 339.

Leaving aside the standard of negligence in Jones Act cases, it is important to this Court's consideration of the Petition that this Court is made aware that the plaintiff also asserted an unseaworthiness claim under the general maritime law.[1] *The standard for contributory negligence under the general maritime law of unseaworthiness is one of ordinary prudence.* See *Marceaux v. Conoco, Inc.*, 124 F.3d 730 (5th Cir. 1997). Although the *Gautreaux* decision was not handed down until after the trial judge's decision, the ordinary prudence standard applicable to the Respondent's actions operated under the additional unseaworthiness claim. Consequently, Petitioners' claims that the trial judge or the Third Circuit Court of Appeal

---

[1] To be seaworthy, a vessel and its appurtenances must be reasonably suited for the use for which they were intended. The owner's duty to furnish a seaworthy ship is absolute and completely independent of the duty under the Jones Act to exercise reasonable care. Liability under the doctrine of unseaworthiness does not rest upon fault or negligence. A more stringent standard of causation is required in an unseaworthiness claim than in a Jones Act claim. Specifically, a plaintiff must prove that the unseaworthy condition played a substantial part in bringing about the injury and that the injury was either the direct result or a reasonably probable consequence of the unseaworthiness. *Johnson v. Offshore Express, Inc.*, 845 F.2d 1347, 1354 (5th Cir.), *cert. denied*, 488 U.S. 968, 109 S.Ct. 497, 102 L.Ed.2d 533 (1988).

did not recognize the standard of ordinary prudence is an erroneous reading of both the trial court's ruling and the Third Circuit Court of Appeal's opinion. The trial court found the vessel upon which Respondent was injured unseaworthy in addition to the finding of negligence under the Jones Act. The trial judge then concluded that the plaintiff was not negligent. The trial judge correctly found no contributory negligence under the Jones Act as well as under the unseaworthiness doctrine. Therefore, the theoretical foundation asserted by Petitioners collapses as it ignores the fact that the court did indeed analyze the actions of Respondent under ordinary prudence standards under the general maritime law. There is no other way to interpret the trial court's decision.

Petitioners did not mention the unseaworthiness claim perhaps because it would be impossible to explain how a proper application of the ordinary prudence standard in the unseaworthiness claim runs afoul of the law and principles and how their federal substantive rights were denied.

The Third Circuit Court of Appeal's Decision

The reasons given in Petitioners' petition for certiorari for still further prolonging this controversy are wholly lacking in substance. Contrary to the assertion by Petitioners, the opinion issued by the Third Circuit did indeed discuss *Gautreaux's* clarification of the duty of care owed by an employer and the seaman under the Jones Act. The court then reviewed the record under a manifest error standard, taking into consideration the *Gautreaux* standard for Jones Act seaman and employers. In fact,

directly after outlining the *Gautreaux* standards, the Court states:

> "Lacking any indication to the contrary, we will not assume that the trial court applied an incorrect standard. Therefore, ***we*** will not undertake a *de novo* review, but ***will review the record*** under a manifest error standard." (Emphasis ours)

701 So.2d 487, 491

The conclusion is inescapable that the Third Circuit Court of Appeal, in citing those passages from *Gautreaux* which clarified the duty of care, imported implicitly the premise that the *Gautreaux* standard is applicable and then set out on a review of the entire record following the standards set forth in *Gautreaux*, 701 So.2d 487, 491.

The mention of *Gautreaux* in the Third Circuit's opinion was more than a passing reference, was more than an observation unnecessary to the decision, and was more than dicta. *Gautreaux* underlies the Court's discussion on Jones Act liability. It stated no caveats or exceptions to *Gautreaux*. In fact the Court's endorsement of the *Gautreaux* case can be found elsewhere when it cited *Gautreaux* again in the opinion, under the subheading "3. *Falcon's negligence.*", to wit: "As the Fifth Circuit indicated in *Gautreaux*, 107 F.3d 331, the Jones Act contains a liberal *causation* requirement. . . . " (Emphasis ours) 701 So.2d 487, 492.

Therefore, the Third Circuit Court of Appeal applied the *Gautreaux* standard in its review of the record for manifest error in the finding of no fault on the part of the Respondent and 100% fault on the part of Petitioner,

Falcon Drilling Company. This is the only fair reading of the opinion. Petitioners' claims that the Third Circuit Court of Appeal did not apply the same standards recognized by the United States Fifth Circuit Court of Appeals are spurious. The judgment of the Louisiana Third Circuit Court of Appeal is correct.

Marceaux v. Conoco

In any event, the finding of unseaworthiness and 100% fault to the Petitioners should preclude as unnecessary any review of the findings under the Jones Act. This was the Court's approach in *Marceaux v. Conoco, Inc., Id.* In *Marceaux,* the Court affirmed a jury's verdict of unseaworthiness and stated "we need not address the defendant's contentions regarding the sufficiency of the evidence supporting the jury's finding of Jones Act negligence." In the *Marceaux* case, alleging Jones Act negligence pursuant to 46 U.S.C. § 688 and unseaworthiness under the general maritime law, the plaintiff, Leroy J. Marceaux, brought suit against his employer, Conoco, Inc. After a five day trial, the jury returned a verdict in favor of Marceaux. The jury determined that Conoco had been negligent under the Jones Act and that Marceaux had not been contributorily negligent under the Jones Act. Additionally the jury held that the M/V LAKE CHARLES was unseaworthy and that the plaintiff had not been contributorily negligent under the general maritime law.

The defendant appealed the judgment for the plaintiff on the following grounds: (1) that the district court erred in allowing the plaintiff's expert, Dr. Gary Nelson,

to testify at trial, **(2) that the evidence was insufficient to support a verdict of Jones Act negligence or unseaworthiness,** and (3) that the district court committed reversible error when it refused to instruct the jury as to the plaintiff's alleged additional duty to make the work place safe or to inspect the premises. The fact that the appellate court would not even consider reviewing the claims of error regarding the Jones act negligence findings by the jury, suggests that *if the evidence was such that the jury found unseaworthiness under the more demanding standards, certainly the evidence was sufficient to maintain the negligence claims under the Jones Act.* **Such is the case before this Court.**

Crawford v. Falcon Drilling

Petitioners cite *Crawford v. Falcon Drilling Co.*, 113 F.2d 1120 (5th Cir. 1997) in support of its argument for review. Reliance on the case is misplaced. Although at first blush, the cases seem similar, a closer look indicates otherwise. Petitioners' reliance on that case is for several reasons unavailing. First, in *Crawford*, the Court based its decision in part on the fact (1) that the trial judge entered written Conclusions of Law, *specifically stating that a seaman has a duty, albeit slight, to use reasonable care to protect himself* – clearly out of sync with *Gautreaux*, and, perhaps more significantly (2) that the trial judge listed facts which would have amounted to a breach of duty to protect oneself had the proper standard been applied. In addition, the vessel was *not* found to be unseaworthy.

In the case before the Court, the trial judge was very specific in saying that Mr. Viator was not negligent in his

work that day and the judge never stated any reliance on the "slight negligence" standard. Likewise, on appeal, the Louisiana Third Circuit reviewed the record specifically in light of *Gautreaux* to determine whether Respondent was comparatively negligent, under the *ordinary prudence* standard, and whether he should be assessed with a portion of the fault. The court stated, "[h]aving reviewed the *entirety* of the testimony and evidence on the issue, we conclude that there is sufficient evidence in the record to support the trial court's conclusion that Viator was not at fault in the accident." (Emphasis ours) 701 So.2d 487, 495. The Court cites conclusions of the experts, including defendants' experts, who concede that Respondent did nothing wrong. Lastly, in the instant case, the vessel was found to be unseaworthy.

CONCLUSION

Supreme Court, Rule 10 provides that "[R]eview on a writ of certiorari is not a matter of right, but of judicial discretion." It further states that "[A] petition for a writ of certiorari will be granted only for compelling reasons. A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Nothing in the Petition provides a *compelling reason* for this Honorable Court to grant the writ of certiorari. Since no substantive federal rights have been denied the Petitioners, no constitutional issues are presented, and there is an absence of conflicting decisions, certiorari should be denied. Petitioners are merely seeking to prolong the

case, and granting the writ would invite wasteful litigation.

Nor is this case the vehicle for this Court's consideration, clarification, or establishment of the Jones Act negligence standards applicable to state courts. Louisiana courts, including the Third Circuit Court of Appeal, *are applying the Gautreaux* standards. See, e.g., *Walton v. Cooper/T. Smith Stevedoring*, 1998 WL 102972 (La. App. 4 Cir. 3/4/98); *Parks v. Pine Bluff Sand & Gravel Co.*, 1998 WL 63805 (La. App. 3 Cir. 2/18/98); *Nelton v. Crewboats, Inc.*, 706 So.2d 183 (La. App. 4 Cir. 12/30/97); *Jenkins v. Sonat Offshore U.S.A., Inc.*, 705 So.2d 1184 (La. App.1 Cir. 12/29/97); *Vendetto v. Sonat Offshore Drilling Co.*, 701 So.2d 243 (La. App. 1 Cir. 9/23/97); *Foster v. Destin Trading Corp*, 700 So.2d 829 (La. 1997). There is no conflict between the United States Court of Appeals for the Fifth Circuit and the Louisiana state courts. In that respect there is no jurisdictional basis for this Court to entertain the Petition.

Therefore, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

James Parkerson Roy (11511)
Bob F. Wright (13691)
Carla M. Perron (21016)
Counsel of Record
Domengeaux, Wright & Roy
556 Jefferson Street, Fifth Floor
Lafayette, Louisiana 70502
(318) 233-3033

Attorneys for Respondent

APPENDIX

PATRICK VIATOR	*	DOCKET NO.:
VERSUS	*	95-65818 2A
LIVERPOOL AND LONDON STEAMSHIP PROTECTION AND INDEMNITY ASSOCIATION, FALCON DRILLING COMPANY, INC. AND FALRIG OFFSHORE (U.S.A.), L.P.	*	15TH JUDICIAL DISTRICT COURT
	*	VERMILLION PARISH, LOUISIANA

SATISFACTION OF JUDGMENTS

STATE OF LOUISIANA

PARISH OF LAFAYETTE

BE IT KNOWN that on the day and date hereinafter mentioned, before the undersigned Notary Public., in and for the aforesaid Parish and State, personally came and appeared:

> PATRICK VIATOR, a person of full age and a resident domiciliary of Iberia Parish, Louisiana; and
>
> JAMES PARKERSON ROY, a person of full age and a resident domiciliary of Lafayette Parish, Louisiana,

who after being duly sworn, declared:

That JAMES PARKERSON ROY is the attorney for PATRICK VIATOR and acknowledges receipt by Plaintiff,

PATRICK VIATOR, of the sum of SIX HUNDRED SEVENTY-NINE THOUSAND FOUR HUNDRED SIXTY-SIX AND 27/100 ($679,466.27) DOLLARS.

APPEARERS further acknowledge that said amount is received in full and complete satisfaction of the Judgments rendered herein in favor of PATRICK VIATOR against FALCON DRILLING COMPANY, INC., FALRIG OFFSHORE, INC. (U.S.A.) L.P., AND LIVERPOOL & LONDON STEAMSHIP PROTECTION & INDEMNITY ASSOCIATION by the 15th Judicial District Court for the Parish of Vermilion, State of Louisiana and the Louisiana Third Circuit Court of Appeal, and APPEARERS do hereby direct the Clerk of Court for the 15th Judicial District Court for the Parish of Vermilion, State of Louisiana, to remove and mark the said Judgments as being satisfied and to otherwise cancel and discharge the Judgments, upon payment of costs by the Defendants.

THUS DONE AND SIGNED on this 6th day of April, 1998, in multiple originals in the presence of the undersigned competent witnesses and me, Notary, after due and complete reading of the whole, at Lafayette, Louisiana.

WITNESSES:

/s/ Sandra Migues

/s/ Susan B. Thomas

/s/ Patrick Viator
PATRICK VIATOR

/s/ Darlene J. Pelletur
NOTARY PUBLIC

WITNESSES:

/s/ Sandra Migues

/s/ Susan B. Thomas

/s/ James Parkerson Roy
JAMES PARKERSON ROY
Attorney for Plaintiff,
PATRICK VIATOR

/s/ Darlene J. Pelletur
NOTARY PUBLIC